88-856 (1)

No.

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JAMES D. HARMON, JR.
Counsel of Record
BOWER & GARDNER
110 East 59th Street
New York, NY 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

40 pp

Questions Presented

1. Whether a district court abuses its power by compelling a local legislator to vote to adopt local legislation in an attempt to remedy violations of the federal constitution where less intrusive means are available.

2. Whether a local legislator is entitled to legislative immunity for his vote on a local ordinance.

3. Whether the First Amendment prohibits a district court from restraining a local legislator from voting on local legislation according to his conscience.

4. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for not voting to implement a consent decree to which he did not consent, and which was agreed to by others only after the district court threatened to impose sanctions for contempt.

5. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for failing to vote in favor of specific legislation implementing a consent decree when the consent decree imposed no such obligation because it explicitly left intact the legislator's right to exercise legislative discretion.

6. Whether a district court deprives a local legislator of due process of law by adjudging him in civil contempt without giving him the opportunity to prepare a defense, present evidence, and to be heard on each of the foregoing questions.

Table of Contents

	Page
Questions Presented	i
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons For Granting The Writ	7
I. The Court of Appeals' Decision Presents Novel Questions of Historic Importance Which Were Incorrectly Decided	7
II. The District Court Abused Its Contempt Power By Unnecessarily Intruding Upon The Individual Rights Of Councilman Chema	9
III. Councilman Chema Is Entitled To Absolute Legislative Immunity For His Legislative Vote	11
IV. The District Court's Order That Councilman Chema Vote In Favor Of Local Legislation Violated His Right Of Free Speech	17
V. The Consent Decree Did Not Bind Councilman Chema Because He Did Not Consent To It	20

Page

VI. The Terms Of The Consent Decree Did Not Warrant The District Court's Order Of July 26, 1988 Directing Councilman Chema To Vote In Favor Of The Ordinance..... 23

VII. The Judgment Of Contempt Against Councilman Chema Violated Due Process 25

Conclusion 27

Statutory Appendix A1

TABLE OF AUTHORITIES

Page

CASES

Aitchison v. Raffini, 708 F.2d 96 (3d Cir. 1983) 12

Anderson v. Dunn, 19 U.S. (6 Wheat.) 61 (1821).... 9

Bond v. Floyd, 385 U.S. 116 (1966)..... 23

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980).... 13, 15

Bush v. Orleans Parish School Board, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) 16, 17

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La), *aff'd sub nom.*, Denny v. Bush, 367 U.S. 908 (1961)..... 16, 17

Carroll v. City of Prattville, 653 F. Supp. 933 (M.D. Ala. 1987)..... 15

Coffin v. Coffin, 4 Mass. 1 (1808) 15

Davis v. City of Portsmouth, 579 F. Supp. 1205 (E.D. Va.1983), *aff'd*, 742 F. 2d 1448 (4th Cir. 1984) 15

Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983) 13

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 7, 24

First National Bank of Boston v. Bellotti, 435 U.S. 765, *reh'g denied*, 438 U.S. 970 (1978)..... 20

Page

Forrester v. White, 484 U.S. ____, 56 U.S.L.W. 4067 (Jan. 12, 1988) 14

Gary H. v. Bradley, 831 F.2d 1430 (9th Cir. 1987) .. 10

Gorman Towers, Inc. v. Bogoslavsky, 626 F. 2d 607 (8th Cir. 1980) 13, 15

Gravel v. United States, 408 U.S. 606, *reh'g denied*, 408 U.S. 902 (1972) 13

Griffin v. County School Board, 377 U.S. 218 (1964) 16, 17

Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982) 13

Hope Baptist Church of Castle Point v. City of Bellafontaine Neighbors, 655 F. Supp. 1216 (E.D. Mo. 1987) 15

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 20

In Re Dibella, 518 F.2d 955 (2d Cir. 1975) 26

In Re Sadin, 509 F.2d 1252 (2d Cir. 1975) 26

In Re Sutter, 543 F.2d 1030 (2d Cir. 1976) 26

In the Matter of Kitchen, 706 F.2d 1266 (2d Cir. 1983) 25, 26

Page

Kamhi v. Planning Board of Town of Yorkton, 59 N.Y.2d 386, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983) 15

Karcher v. Daggett, 580 F. Supp. 1259 (D.N.J.), *aff'd*, 466 U.S. 910 (1984) 10

Kneeland v. Luce, 141 U.S. 437 (1891) 21

Kusinich v. County of Santa Clara, 689 F.2d 1355 (9th Cir. 1983) 13

Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391 (1979) 8, 11-14

Local Number 93, International Association of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 20, 21, 23, 24

Milliken v. Bradley, 433 U.S. 267 (1977) 9, 16-17

Minnesota v. Murphy, 465 U.S. 420, *reh'g denied*, 466 U.S. 945 (1984) 22

Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (lst Cir.), *cert. denied sub nom.* White v. Morgan, 426 U.S. 935 (1976) 10

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 19

New York State Association for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980) 10

Page

New York Times Company v. United States, 403 U.S. 713 (1971) 19

Newman v. Alabama, 683 F.2d 1312 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) 10

Patterson v. Colorado, 205 U.S. 454 (1907) 19

Powell v. McCormack, 395 U.S. 486 (1969)..... 23

Reed v Village of Shorewood, 704 F.2d 943 (7th Cir. 1983)..... 12

Rizzo v. Goode, 423 U.S. 362 (1976)..... 11

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), *amended on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983) 9

Schenk v. United States, 249 U.S. 47 (1918)..... 19

Shillitani v. United States, 384 U.S. 364 (1966) 9

Simmons v. United States, 390 U.S. 377 (1968)..... 22

Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980)..... 13

State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, *modified on other grounds*, 444 U.S. 816 (1979)..... 9, 10

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980)..... 14

Page

Swann v. Charlotte-Meckelenburg Bd. of Ed., 402 U.S. 1 (1971), *reh'g denied*, 403 U.S. 912 (1971) .. 9

System Federation No. 9 v. Wright, 364 U.S. 642 (1961) 24

Tenney v. Brandhove, 341 U.S. 367 (1951), *reh'g denied*, 342 U.S. 843 (1951)..... 11, 13, 15

Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 2462 (1987) 10

Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968)..... 22

United States v. Armour & Co., 402 U.S. 673 (1971) 21, 24

United States v. Chema, ____ U.S. ____ 109 S. Ct. 14 (1988) 6

United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988)..... 6, 18, 22, 25, 26

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 24

United States v. Ward Baking Co., 376 U.S. 327 (1964) 21

United States v. Yonkers Bd. of Ed., 624 F. Supp. 1276 (S.D.N.Y. 1985) 3

Page

United States v. Yonkers Bd. of Ed., 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2821 (1988) 3

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 15, 25

Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) 10

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1942) 18

Westfall v. Erwin, 484 U.S. ___, 56 U.S.L.W. 4087 (Jan. 13, 1988) 13

White v. Morgan, 426 U.S. 935 (1976) 10

Wooley v. Maynard, 430 U.S. 705 (1977) 18

Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974) .. 10

Yonkers Racing Corp. v. City of Yonkers, No. 88-6140, slip op. (2d Cir. Sept. 22, 1988). 21, 22

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 6, Cl. 1 2

U.S. Const. amend. I. 2, 17, 19

U.S. Const. amend. V 2

U.S. Const. amend. XVI, § 1 2

Page

STATUTES, REGULATIONS AND RULES

Charter of the City of Yonkers, art. III, § C 3-1A.. 2, 14

Rule 43(a), Eastern and Southern District Courts Of New York 25

OTHER AUTHORITY

Black's Law Dictionary, 370 (5th ed. 1979)..... 21

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner, Yonkers City Councilman Peter Chema, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on August 26, 1988.[1] That judgment and opinion affirmed as to Council-

[1]The parties to the proceeding below were Petitioner Peter Chema, Councilmen Henry Spallone, Nicholas Longo and Edward Fagan, Respondent United States of America, Respondent Yonkers Branch-National Association for the Advancement of Colored People (hereafter "NAACP"), City of Yonkers, Yonkers Board of Education and Yonkers Community Development Agency.

man Chema and the three other councilmen, and affirmed as modified, as to the City of Yonkers, the orders dated July 26 and August 2, 1988 of the United States District Court for the Southern District of New York, directing the councilmen to vote in favor of local zoning legislation, and adjudging them in civil contempt and imposing coercive monetary sanctions and imprisonment, for not doing so.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 856 F.2d 444 (2d Cir. 1988); a copy is reprinted in the Appendix hereto, Exhibit E. The orders of the United States District Court for the Southern District of New York are unreported; they are reprinted in the Appendix hereto, Exhibits A & C.

Jurisdiction

The Court of Appeals' order was entered on August 26, 1988. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

U.S. Const. Art. I, § 6, Cl. 1; U.S. Const. amend. I; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and Charter of the City of Yonkers, article III, § C 3-1A are set forth in the Statutory Appendix hereto.

Statement of the Case

The United States brought this case in 1980, claiming that the City of Yonkers (the "City") and the Yonkers Board of Education had intentionally created or maintained racial segregation in the City's housing and schools. On Novem-

ber 20, 1985, the District Court issued its liability ruling, finding that a concentration of subsidized segregated housing in the Southwest section of the City was "the result of a pattern and practice of racial discrimination" by City officials. *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1373 (S.D.N.Y. 1985). On December 28, 1987, the Court of Appeals affirmed the judgment of the District Court. *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ____U.S.____, 108 S. Ct. 2821 (1988).

In January 1988, Councilman Chema began his third term as a Councilman for the City after having been elected in November 1987. His first two terms as a Councilman occurred during 1980-1984 when he represented the First Ward on the City's West Side, which then contained most of the City's subsidized housing. Appendix p. 1r. None of the court-ordered housing in this case will be built in areas represented by Councilman Chema.

On January 19, 1988, shortly after Councilman Chema took office, the District Court threatened the City with bankrupting fines if it did not comply with the housing remedy order affirmed by the Court of Appeals:

> Yonkers will comply with the housing remedy order [of July 1, 1987, requiring the City to adopt a housing assistance plan, Appendix p. 20j] or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix p. 8m, 14-15m. On January 28, 1988, the City entered into a Consent Decree, the terms of which required the City to take certain implementing action, including adoption of zoning legislation, which would allow the placement of the court-ordered housing in specified areas:

> The City agrees to adopt . . . legislation . . . providing for zoning changes . . . *provided, however, that such changes are not substantially inconsistent with the character of the area.*

Appendix p. 11 (emphasis added). The City Council voted 5 to 2 in favor of the Consent Decree, with Councilmembers Chema and Henry Spallone casting the two negative votes. Appendix p. 1r.

On June 13, 1988, the District Court issued a Long Term Plan Order which addressed such issues as a legislative package of incentives for developers and the number, distribution and location of court-ordered housing units, as well as affordability and occupancy criteria. Appendix p. 1d. On June 28, 1988, the City Council defeated a resolution that the City would enact such legislation. Appendix p. 2a. Councilman Chema voted against the resolution.

On July 26, 1988, the District Court considered a draft of the Affordable Housing Ordinance (the "Ordinance"), which would have permitted the construction of court-ordered housing in areas not permitted by existing zoning laws. On that same day, the District Court directed the City to enact, on or before August 1, 1988, the legislative package called for by the Consent Decree. The July 26, 1988 order varied the terms of the Consent Decree because it directed councilmembers to vote in favor of the Ordinance as drawn, without regard to whether the Ordinance would create changes substantially "inconsistent with the character of the area." *See* Appendix p. 7l.

The July 26, 1988 order further provided that if the City failed to enact the legislative package by August 1, 1988, each councilmember who failed to vote in favor of the legislation would be fined $500 per day and later imprisoned until the City enacted the legislation or the councilmember changed his vote. Appendix pp. 1a and 1n.

On July 28, 1988, the District Court wrote a letter stating that the July 26, 1988 order would be satisfied if the City Council adopted a resolution, on or before August 1, 1988, committing itself to enact the Ordinance within the minimum time required by state law for public notice and hearing. Appendix p. 1b.

On August 1, 1988, the City Council held a special meeting at which Councilman Chema voted against adoption of the resolution because the Ordinance did nothing for existing housing on the West Side where many minority group members live:

> How can I as an elected official be forced to vote on something that I've never voted on or supported before? I feel my constitutional rights are being violated tonight. I feel we find ourselves in this imbroglio because the judge has turned a deaf ear towards the fact that the remedy is not a remedy that serves the whole city. We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well. As I went through the areas of the city I found that the West, many, many Westsiders in my district wanted to see the areas along the waterfront, along Radford Street, along all the areas that I represent, and along all the West Side, to be fixed up.

On August 2, 1988, in open court, Councilman Chema's counsel advised the District Court that he had been retained at 8:00 a.m. that morning, and that an adjournment was necessary to prepare to meet the charge of civil contempt. The District Court denied Councilman Chema's application, adjudged him in civil contempt without a hearing, and ordered him to pay a fine of $500 per day and then, on the tenth day, to be imprisoned until he purged himself of the contempt by voting in favor of the Ordinance. The District Court also held the City in contempt and levied "bankrupting" fines against it. Appendix pp. 14-15c and 2-3g. The District Court also acknowledged the unprecedented character of its July 26th order:

> I know of no parallel for a court to say to an elected official, you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote. I find that extraordinary.

Appendix p. 29c.

On August 26, 1988, the Court of Appeals affirmed the judgment of the District Court as to the councilmen and affirmed the judgment, as modified, as to the City. The Court of Appeals set a cap of $1 million-a-day on the City's fines. It also stayed the issuance of its mandate until September 2, 1988, to permit application to this Court for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), Appendix p. 1e.

On September 1, 1988, this Court granted Councilman Chema's stay application pending the timely filing and disposition of a petition for a writ of certiorari. *United States v. Chema*, ____U.S.____, 109 S. Ct. 14 (1988), Appendix p. 1h.

On September 10, 1988, after the City had paid over $800,000 in fines, faced imminent layoffs of many municipal employees and suspension of essential municipal services, the City Council enacted the Ordinance by a vote of 5 to 2. Councilman Chema voted in favor of the Ordinance. He had paid fines totalling $3,500, none of which has been refunded to him. On September 14, 1988, the District Court stated that the fines were not refundable. Appendix p. 2q. Councilman Chema was not imprisoned.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Presents Novel Questions Of Historic Importance Which Were Incorrectly Decided.

This highly controversial case squarely presents this Court with questions of both novel and historic importance warranting review.[2] The Court of Appeals has, in essence, held that a District Court can hold a duly elected local legislator in civil contempt for failing to vote as the district court dictated and against the legislator's conscience. That decision is not only unprecedented, as the District Court itself acknowledged, but wrong.

---

[2]Councilman Chema paid $3,500 in fines, and has not received a refund. Thus, he has a concrete interest in the outcome of the case, and the case is not moot. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute.")

It is wrong because it unnecessarily and profoundly infringes upon individual rights when there exist less intrusive means for the District Court to achieve its worthy goals. The District Court failed to make a balanced, measured response to the City's refusal to adopt the court's legislative package, but instead invoked the extraordinary power of contempt as a first, rather than a last, resort. The result is a provocative and head-on confrontation between individual constitutional rights and inalienable immunities, on the one hand, and the redress of violations of the constitutional rights of others, on the other. Councilman Chema's absolute legislative immunity, free speech protections and due process rights were extinguished, although those rights and the laudable protections of the Fourteenth Amendment could have been accommodated, without extinguishing any of those rights. In sum, the ends do not justify the means.

The Court of Appeals' decision is also inconsistent with the holdings of all seven other Courts of Appeals which, after this Court's decision in *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979), have extended absolute immunity to local legislators. Although this Court, in *Lake Country Estates*, expressly reserved to another day the question of whether absolute immunity should be afforded to local legislators, *Id.* at 404, n. 26, that day has come. This Court should accept this case for review to clarify this sensitive area of constitutional law. Local legislators must know whether there are limits to their absolute legislative immunity.

For these reasons, this Court should issue a writ of certiorari to review the Court of Appeals' decision.

II. The District Court Abused Its Contempt Power By Unnecessarily Intruding Upon The Individual Rights Of Councilman Chema.

A federal court may resort to the contempt sanction only when it represents the "'least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966) [quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Even when protecting the Fourteenth Amendment rights of one party, the Court must take care to guard the constitutional right of others. To achieve this balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971). Here, the District Court could have avoided confrontation with the City Council by establishing a "housing commission" or by directly promulgating the Ordinance. *See, e.g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693, *modified on other grounds*, 444 U.S. 816 (1979). Instead, it took the most intrusive course of action by ordering Councilman Chema and the other councilmen how to vote and how not to vote, and punished them for voting and speaking other than as ordered, thereby staging a wholly avoidable conflict with their legislative immunities and First Amendment rights.

Several circuits have applied the balancing principle in the context of cases implicating constitutional rights and remedies for violation of those rights. In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *amended on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), the court, in commenting on its framework for mandating remedial measures, stated, "We should fashion the *least intrusive* remedy that will still be effective." 679 F.2d at

1126 (emphasis added). In *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, ____ U.S.____, 107 S. Ct. 2462 (1987), the Ninth Circuit ruled that a court "must not require more of state officials than is necessary to assure their compliance with the Constitution." 801 F.2d at 1089. *See also Gary H. v. Bradley*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Newman v. Alabama*, 683 F.2d 1312, 1320 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Finally, the court should avoid "needless confrontation" between the federal judicial power and state or local governments. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

The District Court's July 26, 1988 order was the alternative *most* intrusive upon Councilman Chema's rights because, as the Court of Appeals itself suggested, Councilman Chema was given no choice but to vote contrary to his conscience, or to resign. The goal of building affordable housing could have been accomplished by other means, recognized by the District Court, which would not have intruded upon Councilman Chema's constitutional rights and legislative immunities.[3] The City and the NAACP, in fact, took the position below that a commission would be far less intrusive than a compelled legislative act.

---

[3]Indeed, there is precedent for both the establishment of a commission and direct judicial adoption of legislation. Advisory panels or special masters appointed for the purpose of carrying out remedies in Fourteenth Amendment cases are not unusual. *See, e.g., Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976) (advisory panel); *New York State Association for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980); *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974) (special master). Direct court mandate of legislation or regulations and orders to administrative personnel of the state or locality to implement such laws, while less common, is also not without precedent. *See, e.g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra; Karcher v. Daggett*, 580 F. Supp. 1259 (D.N.J.) (3-judge court), *aff'd, 466 U.S. 910 (1984).*

The Court of Appeals, while acknowledging the rule that a court "must exercise restraint in determining what actions ought to be required of state and local governmental officials," *see, e.g., Rizzo v. Goode*, 423 U.S. 362, 380 (1976), found that "the choice of implementing legislation as a remedy . . . cannot possibly be an abuse of . . . discretion" because "the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation." 856 F.2d at 454, Appendix p. 21e. However, the Court of Appeals confused the responsibilities of the City as an entity and the City Council as an institution, with the rights and obligations of Councilman Chema as an individual councilman who had voted in January 1988 *not* to accept the Consent Decree and thereafter voted consistently not to implement it.

III. Councilman Chema Is Entitled To Absolute Legislative Immunity For His Legislative Vote.

The District Court's contempt order of August 2, 1988 is invalid because it violates Councilman Chema's absolute legislative immunity.

In *Lake Country Estates*, 440 U.S. at 405-06, this Court held that regional legislators have absolute legislative immunity in adopting a land use ordinance and general plan. Quoting from Justice Frankfurter in *Tenney v. Bandhove*, 341 U.S. 367, 377, *reh'g denied*, 342 U.S. 843 (1951), the Court stated:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to

> the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, [3 L Ed 162], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Although this Court expressly reserved the question of local legislative immunity in *Lake Country Estates*, the Court's reasoning for clothing federal, state and regional legislators with absolute immunity, which has "its roots in the parliamentary struggle of 16th and 17th century England" and was "taken as a matter of course by our Nation's founders," *Lake Country Estates*, 440 U.S. at 403, is no less applicable to affording such immunity to local legislators. Indeed, Justice Marshall, in his dissent in *Lake Country Estates*, 440 U.S. 407-08, stated:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "'uninhibited discharge of their legislative duty,'" ante, at 405, 59 L Ed 2d at 412, quoting *Tenney v. Brandhove, supra*, at 377, 95 L Ed 1019, 71 S Ct 783, applies with equal force whether the officials occupy local or regional positions.

Moreover, the Third, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have extended absolute legislative immunity to local legislators. *See, e.g., Aitchison v. Raffini*, 708 F.2d 96 (3d Cir. 1983); *Reed v. Village of*

Shorewood, 704 F.2d 943 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kusinich v. County of Santa Clara*, 689 F.2d 1355 (9th Cir. 1983); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). No Court of Appeals has denied immunity to local legislators since this Court decided *Lake Country Estates*.

The mere threat of suit "may chill legislators in the performance of their duties." *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), *citing Gravel v. United States*, 408 U.S. 606, *reh'g denied*, 409 U.S. 902 (1972), and *Tenney v. Brandhove*, *supra*. It is as likely to inhibit a city councilman's decision-making as it is to inhibit federal, state or regional legislators. As with these particular legislators, the "public good," noted in *Tenney v. Brandhove*, 341 U.S. at 377, requires that a city councilman's decision-making not be inhibited by fear of being hailed into court to face imprisonment and fines for the exercise of his legislative responsibility. The present outcome of this case deters local legislators from freely exercising their legislative duties and conscience. Further, the argument for absolute immunity for local legislators such as Councilman Chema is even stronger here than in *Lake Country Estates*, because Councilman Chema is an elected, not appointed, official, and is answerable to the electorate.

Councilman Chema is entitled to absolute immunity because he acted in a legislative capacity. This and other courts have long applied a functional test to determine whether absolute immunity is applicable in a particular case. In *Westfall v. Erwin*, 484 U.S.____, n. 3, 56 U.S.L.W.

4087 (Jan. 13, 1988), this Court, in an opinion by Justice Marshall, stated:

> In determining the propriety of shielding an official from suit under the circumstances, this Court has long favored a 'functional' inquiry—immunity attaches to particular office functions, not to particular offices.

See also Forrester v. White, 484 U.S. ____, 56 U.S.L.W. 4067 (Jan. 12, 1988) ("Under that approach, we examine the nature of the functions with which a particular official . . . has been lawfully entrusted. . . ."); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (Virginia Supreme Court, in promulgating the State Bar Code, acted in a legislative capacity and had absolute legislative immunity). Thus, in *Lake Country Estates*, 440 U.S. at 405-06, this Court did not look at the level of government at which the official served, but whether the official acted in a legislative capacity comparable to that of state legislators.[4]

---

[4]The assertion in the dissent from the grant of a stay by this Court, that Yonkers' "'extraordinary' system of governance, in which the Council exercises both legislative and executive powers" is a "factual peculiarity" that makes this case "unsuitable for review," does not take into account this functional inquiry test. As stated above, particular functions, not particular offices, are relevant to this inquiry. Furthermore, in *Lake Country Estates*, 440 U.S. at 394 (as acknowledged by Justice Blackmun in his dissent, 440 U.S. at 408), the regional officials possessed both legislative *and* executive powers. Yet, this Court extended absolute legislative immunity to those officials. Moreover, the authority of the Yonkers City Council "is legislative only." Charter of the City of Yonkers, Local Law No. 20-1961, Article III, § C3-1A.

Councilman Chema truly acted within the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. at 376, in voting on the zoning ordinance. In fact, this Court, in *Tenny*, quoted from *Coffin v. Coffin*, 4 Mass. 1, 27 (1808):

> These privileges are thus secured . . . to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; *but will extend it to the giving of a vote.*

Tenney v. Brandhove, 341 U.S. at 373-74 (emphasis added).

Moreover, the power to enact a zoning ordinance is a legislative function delegated by the New York State legislature. *Kamhi v. Planning Board of Town of Yorkton*, 59 N.Y.2d 386, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Thus, Councilman Chema's vote was truly legislative, and he was entitled to absolute immunity. Many lower federal courts have held local legislators absolutely immune from suit for their votes or other actions regarding zoning and land use planning. *See, e.g., Bruce v. Riddle*, 631 F.2d at 280; *Gorman Towers v. Bogoslavsky*, 626 F.2d at 613-14; *Hope Baptist Church of Castle Point v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1221 (E.D. Mo. 1987); *Carroll v. City of Prattville*, 653 F. Supp. 933, 941 (M.D. Ala. 1987); *Davis v. City of Portsmouth*, 579 F. Supp. 1205, 1211 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984).

The cases relied upon by the Court of Appeals, *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) ("Bush I"), *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La), *aff'd sub nom., Denny v. Bush*, 367 U.S. 908 (1961) ("Bush II"), *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Griffin v. County School Board*, 377 U.S. 218 (1964), do not support a contrary result. In *Bush I* and *Bush II, supra*, the court did not, as here, compel the legislators to enact any legislation. It also did not dictate to any particular legislator how to vote on proposed legislation. In the original action, *Bush I*, the court found that the Louisiana legislature was acting in an administrative, not legislative, capacity in administering the New Orleans public schools and was, therefore, not entitled to legislative immunity. *Bush I*, 188 F. Supp. at 922. As the court there stated:

> There is no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a *legislative* function. It is only insofar as the lawmakers purport to act as *administrators* of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from process than the administrative officials it supersedes. As Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 170, 2 L.Ed. 60: "It is not by the office of

> the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing [an injunction] is to be determined." (emphasis in original).

Here, it cannot be denied that Councilman Chema was acting in a purely legislative capacity by virtue of his vote in the City Council. Thus, the *Bush* cases cannot be read so as to negate Councilman Chema's legislative immunity.

Milliken stands for the proposition that remedial measures should be no broader than necessary to correct a constitutional violation. In *Milliken*, the Court stated that "to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects" and that "[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts . . ." 433 U.S at 280, n.15. Finally, the portion of the opinion in *Griffin* relied upon by the Court of Appeals is pure dictum. There is no discussion in *Griffin* of the question of legislative immunity because the issue was not before the Court.

Councilman Chema's absolute legislative immunity precludes civil contempt sanctions against him.

IV. The District Court's Order That Councilman Chema Vote In Favor Of Local Legislation Violated His Right Of Free Speech.

The District Court's orders violated Councilman Chema's right of free speech, and therefore are invalid, because a vote, particularly a vote in open public session by an elected legislator, is speech protected by the First Amendment.

(A)

The July 26, 1988 order which required Councilman Chema to vote for specific legislation constituted compelled speech, which this Court has long held to be violative of First Amendment rights. Thus, in *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 637 (1942) (refusal to stand and participate in pledge of allegiance is protected speech), the Court held that the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind, and that compelled speech is as much prohibited by the First Amendment as are attempts to prevent or inhibit speech. *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (obliterating patriotic motto on license plate is protected symbolic speech).

The District Court could not compel Councilman Chema how to vote, even if it could require the City Council to pass legislation. The District Court's July 26, 1988 order violated this clear limit between what the City can be required to do and what Councilman Chema as an individual and as a legislator cannot be compelled to do.

The Court of Appeals held that the "council members remain free to express their views on all aspects of housing in Yonkers." 856 F.2d at 444, Appendix p. 28e. This statement is, we respectfully submit, so self-evident and so broadly applicable as to be meaningless. In every compelled speech case the unwilling speaker can disavow the statements he is forced to make or actions he is forced to take. But this does not sanction the District Court's violation of Councilman Chema's First Amendment rights, any more than would legislative infringement of free speech.

(B)

The District Court's July 26, 1988 order is especially repugnant to the Constitution because it is an unconstitutional prior restraint: it directs Councilman Chema to vote "yes" with respect to the legislation and it restrains him, in advance of the vote, from voting "no," under pain of civil contempt.

Prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). If the threat of subsequent sanctions "chills" speech, *Id.* at 559, then a prior restraint "freezes" it. The main purpose of the First Amendment is "to prevent all such previous restraints . . . as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *See also Schenk v. United States*, 249 U.S. 47, 51 (1918) (Holmes, J.).

Because prior restraints are so dangerous, the party defending such a restraint has the "heavy burden" of overcoming "a strong presumption against its constitutional validity." *Nebraska Press Association*, 427 U.S. at 415; *New York Times Company v. United States*, 403 U.S. 713, 714 (1971). Accordingly, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden . . . such cases may arise only when the Nation is at war," and the speech poses an immediate threat to American lives. *New York Times Company*, 403 U.S. at 726-27 (Brennan, J., concurring). Here, Councilman Chema's vote on the zoning ordinance obviously neither endangers lives in wartime nor poses an immediate threat to life. The Government, the NAACP and the District Court have failed to overcome the heavy presumption of the prior restraint's invalidity. The Court of

Appeals did not even address this fundamental constitutional issue.

(C)

Even if the District Court's July 26, 1988 order were not a prior restraint, it is still an unconstitutional infringement of Councilman Chema's rights to speak and vote freely. Government restrictions on the rights to speak and vote can survive only where, unlike here, the Government proves that the restrictions are justified by an overriding compelling interest and that less restrictive means to achieve that interest are not available. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, *reh'g denied*, 438 U.S. 970 (1978).

The Government and the NAACP have failed to show that less restrictive means were not available. Indeed, as shown above, less restrictive means were available. Consequently, the District Court's restrictions on Councilman Chema's rights to speak and vote freely were unjustified.

V. The Consent Decree Did Not Bind Councilman Chema Because He Did Not Consent To It.

This case presents the first opportunity this Court has had to consider the important issue of whether a person can be bound by a consent decree to which he did not consent, and which was the product of the District Court's threat to exercise its contempt power. The Court of Appeals' erroneous holding that Councilman Chema is bound by the January 28, 1988 Consent Decree, if left undisturbed, would reverse the principle established by this Court that only a party who had freely consented to a consent decree is obligated by it. *Local Number 93, International Association of*

Firefighters v. City of Cleveland, 478 U.S. 501, 521-22 (1986). *See also Kneeland v. Luce*, 141 U.S. 437, 440-41 (1891) (a stipulation binds only the parties to it).

A consent decree is, by definition, a decree entered by consent of the parties. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Black's Law Dictionary*, 370 (5th ed. 1979). A court cannot order litigants to settle a case by entering into a consent decree, because such a decree would not be voluntary. "[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local Number 93, International Association of Firefighters*, 478 U.S. at 522. It is the parties' agreement that serves as the source of the court's authority to enter a consent judgment, and the court cannot enter or enforce a consent judgment against a person who has not consented to it. *United States v. Ward Baking Co.*, 376 U.S. 327 (1964).

Here, the Consent Decree was not voluntary. The Court of Appeals, only four weeks after the decision appealed from, found in a related case that the Consent Decree was entered into only under threat of contempt. "Yonkers entered into the Consent Decree, only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of Yonkers*, No. 88-6140, slip op. at 6436 (2d Cir. Sept. 22, 1988), Appendix p. 19k. Indeed, on January 19, 1988, the District Court had threatened the City with bankrupting fines if it did not comply with the housing remedy order.

Faced with the threat to the City of ruinous bankruptcy and actual restrictions of their personal liberty, a majority of councilmen capitulated to the District Court's demands and voted for the Consent Decree on January 28, 1988. Under these circumstances, the Consent Decree was not voluntarily adopted because it was induced by the threat of

contempt and was not consensual. *See Minnesota v. Murphy*, 465 U.S. 420, 443 (1984), *reh'g denied*, 466 U.S. 945 (1984) (a person is deprived of free choice if he is threatened with a substantial sanction if he refuses to respond) (Marshall, J., dissenting). Therefore, Councilman Chema was not bound by the Decree.

The Court of Appeals compounded the District Court's clear error by holding that Councilman Chema was bound by the Decree, even though he had voted *against* it. In so holding, the Court of Appeals cited no authority, 856 F.2d at 457, Appendix pp. 27e-28e, and indeed, could not cite any authority. The Court's holding is premised upon the untenable proposition that a legislative majority can bind the minority to vote a certain way in perpetuity by the simple expedient of passing legislation purporting to compel the entire legislature to vote in that way in the future, thus stripping each minority legislator of the unfettered right to vote as he chooses.

The Court of Appeals' suggestion that Councilman Chema was not compelled by the District Court's order to comply with the Consent Decree because he was "free" to resign his office is contrary to this Court's principle that one cannot be presented with a Hobson's choice of either giving up one's constitutional rights or incurring a crushing penalty. A Hobson's choice is, of course, no choice at all, and is only a thinly veiled form of compulsion. *Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) (city employees cannot be fired for refusing to waive their right against self-incrimination).

Thus, contrary to the Court of Appeals' view, Councilman Chema could not be compelled to choose between giving up his fundamental constitutional rights to free speech and to vote his conscience, or continuing to hold the

public office to which he was duly elected. *See Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia House of Representatives could not exclude a duly elected representative because he had spoken against the Vietnam War and the draft). This is especially true because if Councilman Chema had resigned, then his constituents would have been deprived of their most basic democratic right to "choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 Elliot's Debates 257); *Simmons v. Unites States*, 390 U.S. 377, 394 (1968) (a defendant need not waive his Fifth Amendment privilege against self-incrimination to invoke his Fourth Amendment right).

Absurd as it may seem, the Court of Appeals said, in essence, that an elected official was free to express his political views anywhere *except* the legislative chamber to which he was elected.

VI. The Terms Of The Consent Decree Did Not Warrant The District Court's Order Of July 26, 1988 Directing Councilman Chema To Vote In Favor Of The Ordinance.

The District Court's order of July 26, 1988 to vote for the Ordinance was improper, even if the Consent Decree did bind Councilman Chema, because the order in effect impermissibly changed the terms of the Decree. Contrary to the Court of Appeals' view, the District Court did not merely enforce the terms of the Consent Decree, but instead extended the supposed obligations of the councilmen beyond that imposed by the Consent Decree.

A court can enforce only the terms of a consent decree that the parties explicitly agreed to, and cannot vary the decree by adding, deleting, or altering its provisions. *Local Number 93, International Association of Firefighters v. City*

of Cleveland, 478 U.S. 501 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971).[5] Parties enter into a consent decree after carefully negotiating agreement on its "precise terms." *United States v. Armour & Co.*, 402 U.S. at 681.

> [I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.

Local Number 93, International Association of Firefighters, 478 U.S. at 522. It follows that the scope of a consent decree should be narrowly construed because to do otherwise implicates due process rights.

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be constued as it is written, and not as it might have been written.

United States v. Armour & Co., 402 U.S. at 682.

---

[5]The only exceptions to this rule are inapplicable here. These exceptions are that a court may modify a consent decree over the objections of one of the parties where a change in the law brings the decree's terms into conflict with the statute pursuant to which the decree was entered, or there have been changed circumstances which would frustrate the parties' purposes if the decree were not modified. *Local Number 93, International Association of Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984); *System Federation No. 9 v. Wright*, 364 U.S. 642, 646-47 (1961). Here, there have not been any changed circumstances or changes in the law. Therefore, the District Court was without authority to alter the decree.

Here, the District Court violated these principles by altering the Consent Decree to deny the City the right preserved by the Decree to adopt only zoning changes that "are not substantially inconsistent with the character of the area." Appendix p. 71. The July 26, 1988 order did not permit councilmembers to take into account the traditional purposes of the exercise of the police power in zoning "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The Consent Decree expressly reserved the City's right to make such legitimate judgments, but the July 26, 1988 order deprived the City Council of that right, and therefore, the remedy was broader than necessary to remedy the constitutional violation.

Councilman Chema was held in contempt because he voted against the Ordinance, even though the Consent Decree required only zoning which would not cause substantial changes to the affected neighborhoods. Accordingly, the Court of Appeals was wrong when it framed the issue as one involving an obligation undertaken and later repudiated. 856 F.2d at 457. By removing all discretion from Councilman Chema, the July 26, 1988 order went so far beyond the Consent Decree that the invocation of the contempt power to coerce the enactment of the legislation was improper.

VII. The Judgment Of Contempt Against Councilman Chema Violated Due Process.

Councilman Chema was entitled to due process, including notice of the charge against him and the facts upon which it was based. *In the Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983). *See also* Rule 43(a) of the Eastern and Southern Districts of New York. Councilman Chema fur-

ther had the rights to counsel, a reasonable time to prepare a defense, and the opportunity to present his evidence and his view of the legal issues. *In Re Dibella*, 518 F.2d 955 (2d Cir. 1975); *In Re Sadin*, 509 F.2d 1252 (2d Cir. 1975); *In the Matter of Kitchen, supra.* The Government bore the burden of proving Councilman Chema's alleged civil contempt by clear and convincing evidence. *In the Matter of Kitchen, supra; In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976).

The District Court failed to provide Councilman Chema with the foregoing procedural safeguards. Councilman Chema's counsel, who had been retained only two hours before the July 26, 1988 proceedings before the District Court, was not given reasonable and sufficient time to prepare to address the validity and legality of the July 26, 1988 order.

The proceeding itself was highly irregular. No witnesses were sworn and no examination of witnesses took place. The District Court did not require the Government to prove anything, nor did the Government do so. Indeed, the court's offer of a hearing which was to take place only after Councilman Chema would have been found in contempt would have been a mockery of justice.

The burden of proof was impermissibly shifted to Councilman Chema even though the Government had not met its burden of going forward.

The Court of Appeals found that "it would have been preferable . . . for the District Court to have accorded counsel at least a few days to prepare their defenses." 856 F.2d at 453. Given the substantial issues presented by the District Court's unprecedented orders, due process required that Councilman Chema be given more than two hours to prepare a defense.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Dated: New York, New York
November 23, 1988

Respectfully submitted,

BOWER & GARDNER
Attorneys for Councilman Chema
By: _____
JAMES D. HARMON, JR.
Attorney of Record
110 East 59th Street
New York, New York 10022
(212) 751-2900

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

Statutory Appendix

U.S. Const. Art. I, § 6, Cl. 1

> The Senators and Representatives . . . shall in all cases, except Treason, Felony and Breach of the Peace be privileged from Arrest during their Attendance . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U. S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Charter of the City of Yonkers, article III, § C 3-1A.

Legislative powers vested in the City Council.

All the legislative powers of the city, however, conferred upon or possessed by it, are hereby vested in and shall continue to be vested in a Council to be known as "The City Council of the City of Yonkers," . . . and its authority,

except as otherwise provided in this Charter, or by law, is legislative only.

88-856

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JAMES D. HARMON, JR.
Counsel of Record
BOWER & GARDNER
110 East 59th Street
New York, NY 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

Table of Contents.

Page

EXHIBIT A—Order of United States District Court for the Southern District of New York, Dated July 26, 1988 ..... 1a

EXHIBIT B—Letter From Hon. Leonard B. Sand, U.S. District Judge, to All Counsel, Dated July 28, 1988 ..... 1b

EXHIBIT C—Transcript of Hearing Held August 2, 1988 ..... 1c

EXHIBIT D—Long Term Plan Order of United States District Court for the Southern District of New York, Dated June 13, 1988 ..... 1d

EXHIBIT E—Opinion of United States Court of Appeals for the Second Circuit, Dated August 26, 1988. ..... 1e

EXHIBIT F—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 3, 1988 ..... 1f

EXHIBIT G—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 2, 1988, Adjudicating City of Yonkers in Civil Contempt 1g

EXHIBIT H—Decision of United States Supreme Court Dated September 1, 1988, on Application for a Stay 1h

EXHIBIT I—Order of Hon. Leonard B. Sand, U.S.D.J., Dated May 28, 1986 ..... 1i

Page

EXHIBIT J—Opinion of Hon. Leonard B. Sand, U.S.D.J., Dated July 10, 1987 ..... 1j

EXHIBIT K—Opinion of United States Court of Appeals for the Second Circuit, Dated September 22, 1988 ..... 1k

EXHIBIT L—First Remedial Consent Decree in Equity, Dated January 28, 1988 ..... 1l

EXHIBIT M—Transcript of Hearing Dated January 19, 1988 ..... 1m

EXHIBIT N—Transcript of Hearing Dated July 26, 1988 ..... 1n

EXHIBIT O—Transcript Dated September 2, 1988 1o

EXHIBIT P—The Affordable Housing Ordinance .. 1p

EXHIBIT Q—Transcript of Hearing Dated September 14, 1988 ..... 1q

EXHIBIT R—Affidavit of Peter Chema Dated August 17, 1988 ..... 1r

EXHIBIT A—Order of United States District Court for the Southern District of New York, Dated July 26, 1988.

(31)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

80 CIV 6761 (LBS)

ORDER

Part VI of this Court's May 26, 1986 Housing Remedy Order required the City of Yonkers to submit, by November 15, 1986,

a Long Term Plan for affordable housing units. It is beyond dispute that the City has defaulted on this obligation. Specifically, the City of Yonkers refused to submit such a plan on November 15, 1986. Furthermore, despite its agreement in the January 28, 1988 First Remedial Consent Decree in Equity to adopt no "later than 90 days after entry of [the January 28, 1988 decree]" a legislative package of incentives for developers to encourage development of 800 units of affordable housing, and this Court's entry of the Long Term Plan Order on June 13, 1988, the City has failed and refused to enact such legislation. On June 28, 1988, the City Council defeated a Resolution stating that the City would enact such legislation. In its Memorandum (32) filed on July 11, 1988, the City further stated that "the City has indicated by the defeat of the Resolution . . . that it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order." City of Yonkers Memorandum of Law in Opposition to Plaintiffs, Proposed Order, p. 4. This Court will tolerate no further violation of its lawful orders and accordingly enters this Order.

1. The City of Yonkers is hereby ORDERED to enact, on or before August 1, 1988, the legislative package relating to the long-term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long-Term Plan Order dated June 13, 1988.

2. It is further ORDERED that, in the event the City of Yonkers fails to enact the legislative package on or before August 1, 1988, the City of Yonkers shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why it should not be held in contempt, and each individual City Council member shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why he should not be held in contempt.

3. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, 1988, and the City cannot demonstrate why it should not be held in contempt, beginning on August 2, 1988, the City shall be subject to daily fines until

such time as the City has purged itself from contempt by enacting the legislation. The City's fine shall be $100 for (33) the first day and the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid Pursuant to this Order shall not be refunded even in the event that the City eventually ceases its contumacious conduct.

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the Council members who fails to vote in favor of enactment of such legislation, and has not demonstrated why he should not be held in contempt, shall be personally fined $500 per day every day (but not doubling) until such time as such individual has purged himself from contempt as described below or the City has enacted the legislation. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and shall be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount (34) of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that an individual ceases its contumacious conduct. Fines imposed by this paragraph shall be paid personally by each indi-

vidual Council member and under no circumstances shall any City funds be used or appropriated for such purpose. An individual may purge himself by voting to enact the necessary legislation. However, if the legislation is not passed and on any subsequent vote such individual again fails to vote in favor of the legislation, he or she shall once again be personally fined $500 per day until such time as such individual has once again voted in favor of the legislation or the City has enacted the legislation.

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988, any Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United Stated Marshall for imprisonment until such time as the City has enacted the legislation or such member has purged himself from contempt as provided in paragraph 4. The fines described in paragraph 4 shall continue during any time of imprisonment.

(35) 6. It is further ORDERED that the Mayor of Yonkers shall convene a special session of the City Council for the purpose of voting on the legislative package at least once a week beginning on August 1, 1988, or more frequently if so requested by any Council member. Any Council member who is imprisoned pursuant to paragraph 5 above shall be released for the purpose of attending such meetings and for no other purpose.

7. It is further ORDERED that the City shall forthwith deliver a copy of this Order to the New York State Emergency Finacial Control Board for the City of Yonkers.

8. It is further ORDERED that the Mayor of the City of Yonkers shall by August 1, 1988 post in a conspicuous place in all public buildings a copy of this Order together with the following notice:

All employees of the City of Yonkers are hereby put on notice that failure to comply with, or interference with implementation of, the court order attached herewith may subject any employee of the City of Yonkers to personal contempt sanctions imposed by the court.

It is so ORDERED, this 26 day of July, 1988.

LEONARD B. SAND
United States District Judge

EXHIBIT B—Letter From Hon. Leonard B. Sand, U. S. District Judge, to All Counsel, Dated July 28, 1988.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
New York, New York 10007

July 28, 1988

Re: *U.S.A. v. Yonkers, et al.*,

TO ALL COUNSEL:

With respect to this Court's Order of July 26th, 1988, that specific Order of the Court will be satisfied if the City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

Regardless of what action the City Council does or does not take on or before August 1st, counsel for all parties are to appear before the Court on Tuesday, August 2nd, at 10:00 A.M.

At such time, if called upon, they are to be prepared to state their views with respect to the enclosed proposed Order.

Very truly yours,

LEONARD B. SAND,
United States District Judge

EXHIBIT C—Transcript of Hearing Held August 2, 1988.

(143)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

and

YONKERS BRANCH NAACP, *et al.*,

Plaintiff Intervenor

against

YONKERS BOARD OF EDUCATION, CITY OF YONKERS, AND YONKERS COMMUNITY DEVELOPMENT AGENCY

80 Civ 6761 LBS

Defendants

August 2, 1988
10:00 a.m.

The Court: I have attempted unsuccessfully to obtain a larger courtroom for these proceedings and I understand there are people outside who cannot be allowed in because we are

filled to capacity. I regret that. There are many other matters that are taking place in this courthouse today.

This court entered an order on July 26th which among other things ordered the City of Yonkers to take certain action on or before August 1st and provided that if that action were not taken, this hearing would be held to show cause why the City of Yonkers should not be held in (144) contempt and each individual city council member shall be required to show cause at a hearing before this court at 10 a.m. on August 2nd why he should not be held in contempt.

For the record, Mr. Sculnick, did the city council on or before August lst take the ordered action?

Mr. Sculnick: They took two actions last night.

First a public hearing has been set for August 15th on appropriate notice under state law to have a public hearing, after which the city council would be entitled to vote on the zoning ordinance that has been required under the court's long-term plan order. And with respect to a resolution of intent, to adopt that ordinance, the city council defeated that resolution of intent by a vote of 4 to 3 last night.

The Court: Are there present in the courtroom this morning the four members of the city council who voted against the resolution of intent?

Mr. Sculnick: Yes, there are. In fact all members of the city council are present in the courtroom today.

The Court: Very well.

Mr. Sculnick, I will hear you with respect to why the City of Yonkers should not be held in contempt. You may proceed.

Mr. Sculnick: Your Honor, I am here today (145) representing the municipal corporation of the City of Yonkers not the individual council members. With respect to the City of Yonkers and in that regard, your Honor, when I refer to the City of Yonkers, I mean to refer to the municipal corporation. When I refer to the city council, I will do so specifically.

The city opposes the imposition of fines or other contempt sanctions for three reasons: First the city has urged for at least the last three or four weeks that this is unnecessary and regretable confrontation between the federal court and the city council. The city urged back in July, at the hearing date on July

12th I believe, the return date for the joint motion by the NAACP and the government for the proposed order that was proposed by them on July 5th.

The Court: But the city offered no affirmative proposal?

Mr. Sculnick: That is not true. The city suggested that the court could order the adoption of the zoning ordinance just as it had entered orders for the housing remedy order in May of 1986, just as it had entered the long-term plan order in June of 1988.

The Court: The city's sole proposal was that the city do nothing, but that the court and the court alone act. Is that accurate?

(146) Mr. Sculnick: With respect to the adoption of the zoning ordinance, that is correct. After the city council had failed to adopt the resolution of June 28th that had been suggested by this court, that was the suggestion made by the city.

As a result of the court's decision to enter the July 26th order which is the basis for the hearing today, that order sets forth should the city council fail to adopt the zoning ordinance, fines would commence against the City of Yonkers in the amount of $100 per day for the first day doubling each day thereafter.

The city submits that fines of that magnitude are devastating and will bankrupt the city within a matter of approximately three weeks probably effectively sooner than that. In addition, we have been notified by Moody's Investor Service, one of the bond rating agencies, they issued a credit report on July 29th which indicates that depending on the outcome of last night's vote and the outcome of any proceedings today, that they would take "appropriate action" with respect to the city' bond rating.

We believe that in reference to appropriate action means either the suspension of the city's bond rating or actually lowering the city's bond rating, which is B-AA, which is the lowest investment grade under the Moody's rating system. Any lowering of that bond rating or (147) the suspension thereof would completely preclude the city from access to the capital markets.

That would have extraordinarily negative consequences for at least two reasons: First of all, it would prevent the city from carrying forward any existing capital projects. It would in-

crease the cost of any other borrowing; and lastly, your Honor, and I would urge the court give serious consideration of this matter, it would effectively preclude the city from financing any other aspects of this court's remedial order including the two new schools.

With regard to the punitive nature of the fines, your Honor, the city urges that they are punitive rather than remedial in that they do not necessarily induce compliance.

The Court: What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day isn't going to bankrupt Yonkers. The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

Mr. Sculnick: Your Honor, may I respond to (148) those comments?

The Court: Yes.

Mr. Sculnick: First of all, I just want to make it clear that no other group other than the city council can vote to bring the city into compliance. In other words, the nature of the act which the city has been directed to take is to amend the zoning ordinance.

The Court: But there are measures which can be taken by institutions other than the federal court to comply compliance. The governor, for example, under the Yonkers City Charter, the governor has the right to remove any elected official who engages in improper conduct.

Mr. Sculnick: That is correct. And just last week, your Honor, in an attsmpt by the city manager to induce the city council to comply with the court's orders, the city manager wrote a telegram to the governor seeking the governor's assistance and good office in trying to encourage the city council to pass the resolution on the agenda last night.

The governor's office responded saying that it hoped that the city council would pass the legislation, and, therefore, deemed any action at this point premature.

The Court: What I am trying to say—

Mr. Sculnick: That the city manager in this administration has taken good faith steps within their (149) power to achieve compliance with the court order.

The Court: The city manager is not the person who is subject to this order. His good faith is not an issue.

Mr. Sculnick: He is the chief administrative officer of the city, and I put on the record and before this court's consideration that he has taken efforts to comply with the order; and, therefore, given the efforts by the city's administration to comply, I urge that imposing fines against the city would be unfair and unnscessary and in the respects that I have previously indicated punitive.

The Court: I would like to know a little more if I may about the communication to the governor. Was that in the nature of a request that he use his good offices or was that a request that he exercise powers and responsibilities that he has as the governor of the state under the circumstancs which now obtain?

Mr. Sculnick: Your Honor, I don't have that with me, but I believe it is the former. The governor would be requested to use his good offices, not the latter.

The Court: This is for the record because I understand copies of the Yonkers Charter are difficult to come by.

Mr. Sculnick: I am aware of that.

The Court: It took some time for you to produce (150) a copy. Section C 2-5: Removal from office. Any election officer . . . may be removed from office for misconduct or malversation in office by the governor in the same manner as sheriffs."

You may continue. You were saying punitive nature, and I was responding that the form of the fines was very intentionally drafted to be remedial and not punitive. That is the reason why they start at the very modest level, simply to put everyone on notice as to what will inevitably occur unless there is either compliance or the intervention of some supervening authority.

Now, you are urging that the federal court adopt the ordinance and do that which it is the responsibility of the city council to do. There are a number of difficulties with that. One is

that the federal court should act only when it is satisfied that there is no responsible state or local authority that will act.

The second reason is perhaps philosophical or symbolic and that is there does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the (151) welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Now, it was probably two years ago that I suggested to the city council that if it could not discharge its responsibilities, it could delegate those responsibilities. Those were in the days when we heard that Yonkers was suffering from political paralysis because half of the city council people were running against the other half of the city council people. Those days are gone.

The delegation suggestion then resulted in the appointment of the outside advisor . I recently suggested a commission. The commission can originate not only by an order or this court, but can originate from the city council itself.

It has chosen to do none of these things. It is simply saying no. And that is a very distressing circumstance. What is very peculiar here is if one landed from Mars and came to this courtroom at this stage of the proceedings, it would be very difficult to understand what is happening.

What is most perplexing about this is that in the whole history of this litigation, these eight years, all of the controversy over the schools and all of the controversy over the 200 units of public housing, the least controversial issue seemed to be the affordable (152) housing ordinance. The text of that ordinance was drafted by experts for the City of Yonkers, the provisions in that ordinance for the most part embodying matters which were agreed upon during that brief euphoric period of consensus.

But perhaps it is the realization that the affordable housing ordinance presents the most realistic and greatest opportunity

for accomplishing the remedial purpose of this order which causes this to be the issue which the city council puts itself in the position in which it finds itself this morning.

Mr. Sculnick: Your Honor, may I respond to some of your comments?

The Court: Please do.

Mr. Sculnick: The first issue that you raised is that the federal court should act only when there is no responsible state or local authority that will act. In this case only the City of Yonkers is a defendant. So I think it is taking a comity a bit too far to say if other responsible state authorities fail to act. I think that is putting an unfair burden on the state's responsibilities.

The Court: Unfair burden on the state to have a responsibility when a city of almost 200,000 people totters on the brink of bankruptcy, makes itself a symbol of defiance to a federal court, acts in a manner which is so devastatingly adverse to the interests of its citizens?

(153) It is too much to ask of state officials that they respond to that type of an emergency?

Mr. Skulnick: I think it is one thing to say that they should be invited to participate. It is another thing to say that the court should refrain from taking action which it is empowered to take awaiting the state taking their steps.

My only point is that I don't think that the principal you have enunciated should prevent this court from taking the steps that the city urges, that is, the promulgation or the zoning ordinance.

The Court: We get into a Alfonse Gaston—if I can use that inappropriate reference between—this court and the Emergency Financial Control Board which I know is carefully monitoring this case and has its representative present at all times. The Emergency Financial Control Board awaits this court's action. This court awaits the Emergency Financial Control Board's action and nothing happens.

When the City of Yonkers made an application to this court and said, "we will consent to the entry of a judgment against us for $29 million not to build 200 units of public housing we had agreed to build in 1980 and which would be built with

"federal funds", when the City of Yonkers took that position, it is clear that it crossed the (154) line of any form of fiscal or other governmental responsibility.

So what we are confronted with, and I don't fault the city manager, what we are confronted here with really is a total breakdown in any sense of responsibility.

What we have here is competition to see who can attract the greatest notoriety, who will be the political martyr and without regard to what is in the best interests of the City of Yonkers.

Mr. Sculnick: And that is exactly why, your Honor, we urge the court not to take the steps which would give the counsel members who chose to vote no that notoriety.

The Court: Has the City of Yonkers made an application to the Emergency Financial Control Board? Has any representative of the City of Yonkers said, "We cannot govern the City of Yonkers in a fiscally responsible fashion, step in. We welcome you to do so"?

Mr. Sculnick: No, and I don't think that can be expected of a government. How can any government advocate—

The Court: Harry Truman said, "If you can't take the heat, get out of the kitchen." If the city council can't function, then it should acknowledge the fact that it can't function. If it can't follow federal law, lawful federal court decrees, and if it can't function in that (155) fashion, then it is a nonfunctioning entity. And at least it should have the responsibility to acknowledge its own inability.

Mr. Sculnick: Your Honor, I guess we have debated civic issues before, but I think that would quite frankly be the last thing in my opinion that the city council would do: To vote to go out of existence on this kind of issue. I think that is unrealistic.

The Court: You think it is unrealistic for the city council to say, "We are at an impass. We are at a point where unless some other action is taken, Yonkers will be bankrupt. It will lack the ability to borrow money essential to the functioning of any community. It will involve a massive curtailment of all forms of public service. This we cannot permit to happen; therefore, let us recognize that we can't function. Let us establish a commission. Let us delegate to the commission. Us, the

city council, by our act, not an act imposed upon us by a federal court. We, by our own act, create the commission and we bind ourselves to adopt and comply with its determination"?

Mr. Sculnick: Perhaps that question is best asked of the council members.

The Court: Yes. Is there anytning further you wish to tell me why the City of Yonkers should not be held (156) in contempt and why the court should not impose upon it the fines and sanctions contained in the July 26th Order?

Mr. Sculnick: I think in summation, your Honor, the imposition of the fines proposed in the court's order would have the effect of severely damaging the city's financial posture, but it would be to the detriment of every Yonkers citizen. And in that respect and in that respect in particular, we urge that in effect it punishes the innocent, that it doesn't necessarily coerce compliance by the council members, but it would injure all citizens of Yonkers.

And as a result, we respectfully request the court refrain from imposing fines against the city and not follow through on that proposal. Thank you.

The Court: Mr. Heffernan.

Mr. Heffernan: Good morning, your Honor. Your Honor, we find ourselves in a very unfortunate situation once again. And the United States believes this court has no choice. It has to act. The City of Yonkers and four members of the City of Yonkers's council have acted clearly to defy this court and defy this court's order just as they have in the past.

The court's order is clear. The court's order is unambiguous and there has been clear defiance. Your Honor, the sanctions here are clearly not punitive. As the (157) court said before, it is a classic contempt situation. The court and plaintiffs here are not here to punish anybody. It is not the obligation of the United States here to fine somebody, to imprison somebody. It is our obligation to see that the orders of this court are obeyed. That is why we have proposed the order which the court entered last week. And that is why the court has to today take the strong action necessary to comply compliance with its orders.

The contempt sanctions here are clearly coercive. They will end when the city and city council comply with the court's order. They hold the keys to purging the contempt.

Your Honor, the city's argument that you can somehow divorce the city from the city council, from our perspective borders on the ridiculous. Under the city's view of things, once again it should not be held accountable for actions of its officials. Under that view, your Honor, it may well be the case that it shouldn't be held accountable for the constitutional and statutory violation found by this court over two years ago because it wasn't the city which took those actions, it was the city elected officials and the city's employees. That argument plain and simply has no merit.

The city has to be accountable for this court (158) and obey the orders of this court, and the contempt sanctions must be imposed as the court has ordered. Your Honor, it is our strong belief that if those sanctions are imposed, compliance will be coerced and the remedial process can go forward.

The Court: Mr. Sussman.

Mr. Sussman: Your Honor, may it please the court, as the court is aware the NAACP has previously taken a view in counsel to the court that the imposition of fines and potentially jail sentences might not work, but that should not obscure the issue we are here today on. The issue we are here on today in terms of the legal test is whether as Mr. Heffernan has said the fines and the potential jail sentences are in fact meant to be coercive or punitive.

And on that legal issue, it seems to me obvious that whether I believe as council for NAACP that the measures will work or will be effective in getting long-term compliance it not the issue. It is the court's intent and belief which is clear that they will be. Therefore, that combined with the fact that the condemnor, the City of Yonkers, holds the key to its own liberation so to speak from the fines and potential jail sentences makes these fine clearly remedial and not punitive.

Any reviewing court looking at the situation (159) should clearly be able to distinguish it from the situation that we happened when waiting for a Second Circuit argument in the case two weeks ago in which the court of the Eastern District of this

circuit imposed 15 day jail sentence upon a party, but there was no act that party could take to free itself from the jail sentence. The Court of Appeals was looking at that and wondering how that could be deemed remedial. This is clearly not that case. This is remedially intended sanctions.

I just want to make a couple of other comments. I think what Mr. Sculnick enumerated in terms of the harms to the city are like the city's willingness to spend $29 million to get out of building 200 units of housing. What those statements do in my opinion is not provide a reason or rationale for why sanctions are inappropriate, they show the actual measure and extent of the contemptuous conduct.

If the city here, four members of the the council, are willing to bankrupt Yonkers rather than to let 4000 units, 3200 of which are intended for market rate users, be built, that only is a measure of the enormity of the hatred which exists. It is not an argument against contempt.

Let me speak to the distinction which is in the papers the city today tries to draw. Yonkers city council and the state law, your Honor, is the governing body or the City of Yonkers. The city administrator or city manager (160) and comptroller and other officials are merely employees of the city council. That they have here been somewhat independent and somewhat more progressive is irrelevant legally because the legal entity in Yonkers which can act is not the city administration. It is the city council.

Mr. Heffernan I believe is accurate in saying that that distinction has no legal merit.

Finally, I believe, your Honor, and I just want to reiterate the point made in the last court session that while the sanctions here must be imposed, the court cannot be seen as having made these threats and backing away from them. They are clearly legally justified. In our judgment they are insufficient, and I think that is perhaps the central issue that we may talk about later today.

What we had last night in the acting out and the attempt to not let others into the city council meeting who have a different point of view, and all of those tactics which frankly in a demo-

cratic society are regrettable, what we have is a continued demonstration that the city council cannot implement.

Your Honor used the term advocating governmental responsibilities. Of course the city council won't make that declaration because it is not advocating government responsibility. It is doing the will of the people. The court has posed a paradoxical situation.

From the court's (161) point of view and perhaps my point of view, they are not governing consistently with the constitution. But from their point of view, they are at the pinnacle of efficacy. And that was the rationale of Mr. Fagan, one of the condemning parties used in explaining his vote.

He said, "I wasn't going to make clear my view until I came and saw how the people wanted me to act." It is the same thing that Cipriani and Longo said in 1982 regarding School 4. The same reference is used and in their mind they are governing with great efficiency and great fairness to their people.

The point I am making is that as long as that is the reference—and I believe it continues to be the reference—another structural change is required or else the City of Yonkers believing that it is governing truly to the wishes of its people will continue to act in contempt and we will not get housing built. And frankly that is their goal. So they become in a sense the winners.

I think the contempt is clearly justified against the city. This court would be fully within its legal responsibilities and rights and authority to impose contempt and the prudential consideration which I have otherwise urged against do not apply because the court order isn't stayed. I want to make that distinction. Thank you.

(162) The Court: Anything further with respect to the City of Yonkers?

Mr. Sculnick: Just briefly, your Honor. Just addressing the distinction between the city council and the city, those kinds of distinctions are made all of the time in the law, and I think that they are especially forceful in this case where the city council members while elected and have the authority to take specific actions under state law, there are greater manifestations of the

city at large. There are the citizens, the employees of the city, and the people in the city who depend upon the city services.

The city administration takes responsibility to implement its objectives in providing city services. So that I think that in many respects those distinctions are valid ones. It is a distinction we have long recognized between a corporation and its board of directors, and I think that that analogy is somewhat applicable here.

So although it is true that only the city council under state law is authorized to take the actions that this court has ordered, for that very reason, it is unfair to fine the city since but for the action of its council members, the city is powerless to comply with the court's order. Therefore, in that sense, the fines will have a disastrous impact on innocent people who are unable to actually effectuate—

(163) The Court: A long time ago I used the analogy of a factory that was spewing out polluting fumes to a community and was ordered by a court to cease contaminating the community. The response was, "well, we presented this to our board of directors and we couldn't get a majority" or I think the analogy was, "we are split 4 to 4."

Mr. Sculnick: In that case the plant manager could have turned the plant off. There were actions that could have been taken to comply with the court order.

The Court: Turn off the City of Yonkers? Some people are bent on just that course.

Mr. Sculnick: That is indeed an unfortunate result that may obtain and that is exactly why we are urging that the city not be fined itself. Thank you.

The Court: The following constitutes the findings of fact and opinion and conclusions of law of the court with respect to the City of Yonkers and whether pursuant to this court's order of July 26, 1988, it should be held in contempt. It is important to recognize at the outset the true significance of this proceeding. It would be difficult to imagine a clearer challenge to the constitution of the United States and to a government of law than that presented this morning.

If a federal court order designed to remedy racial discrimination can be flouted by a municipality (164) because that is what

appears to be the course of political expediency, then we no longer live under a constitutional form of government. Then one has to put an asterisk to the constitution and say, "Provided, however, that if the community is sufficiently hostile to remedial action designed to insure and protect these rights, then all bets are off."

The magnitude of the issue before this court is no less than that. The tragedy of this is that the victims of all that has happened are the citizens of Yonkers including, of course, the members of the class on whose behalf this action was brought. The extent of the resistance by the City of Yonkers and its elected officials and segments of its population to the enforcement of remedial order of this court is unprecedented, and yet this is the same community which in other contexts has shown that with responsible leadership and a well motivated staff, much can be accomplished.

I refer to the experience with respect to the school orders which we will address later this week where there is every reason to believe that in good faith the responsible officials have been carrying out the court's orders and with results which exceed expectations, and it is the same city.

The city council of Yonkers has chosen (165) deliberately to defy the court with respect to an aspect of the remedy proceedings which have in fact been the subject of very little controversy. The City of Yonkers through its council has represented to this court that there are no substantive objections to the affordable housing ordinance.

It is separate and apart from the public housing issues and all the controversy which surrounded the designation for the sites for that housing. It is very clear Yonkers has said, "We alone among the communities in this country will not obey federal court orders because we perceive—we, the elected officials perceive that it is politically to our advantage to do so." We will address later this morning the question of individual responsibility of individual city council members.

The court finds that the City of Yonkers has been given adequate notice of these proceedings and an opportunity to be heard. The court finds that the City of Yonkers is in contempt and indeed this is but the latest of a series of contempts, but

this is the most immediate and most clearly defined. The court rejects the contention that a dichotomy can be drawn between the city and the city council. We addressed at some length in our liability opinion this question of the spreading of authority among different entities with a hope that responsibility will be escaped by all.

(166) The City of Yonkers is in contempt because it intends to be in contempt. No claim is being made of any procedural defect. No claim is being made of a failure to understand or perceive the consequences of the contempt. Yonkers chooses to place itself in contempt and the consequences of that are the responsibility of Yonkers and those who speak on its behalf. Accordingly the court finds that the City of Yonkers is in contempt and the court then, therefore, imposes upon Yonkers the fines beginning on August 2, 1988, set forth in paragraph j of the order of July 26th.

Therefore, there is to be delivered no later than 4:30 p.m. today to the clerk's office the check payable to the clerk, Southern District of New York. That is the responsibility under this order of the city manager and I am sure there will be compliance with that. Those fines will continue doubling each day.

Mr. Sculnick: Point of clarification on just that last sentence. My reading of the order indicates that today is the first day that the city be held in contempt, that that check is to be delivered no later than 4:30 tomorrow reflecting the fine imposed today. Is that correct?

The Court: Yes. That is correct.

Now, the question raised then is how long does (167) this continue? It will continue? It will continue as long as the city council continues to defy the order of the court and the fines will mount. This court is open at all times to any application that may be made based on a change in circumstances which would warrant a change.

I repeat—I say it over and over—that this court is not the only institution which has the responsibility for protecting and enforcing the constitution and the laws of this land. As so often happens, it is the very people who do not come forth when they have the responsibility to act who are often heard to talk about federal judicial activism. I believe no court has strained

harder or with greater patience to defer to state and local government than this court has done.

The other officials of the state who have taken oaths to protect and defend the constitution, the members of the Emergency Financial Control Board and all others are on notice: The course on which Yonkers is headed is clear.

Let me make one other point with respect to the fines that perhaps I had not made clearer at an earlier date. I think Mr. Sussman on behalf of the NAACP at one point expressed a concern that there would be a period of contempt and then a period of compliance and then a further period of contempt. I want to make it clear that it is this court's intent that it occurs, then, of course, (168) the level of subsequently daily fines picks up at the point at which it ended as a result of any previous finding of contempt.

Anything further with respect to the City of Yonkers?

Mr. Sculnick: Yes, the city would apply for a stay of the court's finding on contempt and imposition of fines and the city would make the following specific suggestion in that regard: As I indicated earlier today, the city council took two actions last night. One of those actions was the setting down for public hearing of the zoning ordinance and a public hearing to be held on August 15th. The city would suggest that the fines against the city be stayed until August 15th, and that if at that time the council fails to adopt the ordinance, that at that point the fines would resume as compounded for the intervening time period.

The Court: Mr. Sculnick, seated behind you are all of the members of the city council of Yonkers. Are you making a good faith representation to the court that if such a stay were granted, you have reason to believe that on August 15th, the ordinance would be passed? Are you making such a representation?

Mr. Sculnick: No, your Honor, I don't have the factual basis for making that statement.

(169) The Court: I know that you don't and I did not mean to create any personal embarassment. Let me deal with the matter of August 15th. The question was raised I believe by your office after the July 26th order was signed in open court

concerning state law provisions with respect to the time for a city council proceeding to amend the zoning law. Rather than deal with the question of the extent, if any, to which those time tables were superseded by the federal court order, just to obviate that question, the court indicated that it would suffice if there were a declaration of intent, to adopt the resolution after the requisite time period had elapsed. And that resolution was defeated.

I have to repeat two points. One is there has been no substantive objection made to a single provision of the affordable housing ordinance and the second is as I said in my earlier remarks the City of Yonkers is in contempt because it chooses to be in contempt. It does not find itself inadvertently in this posture. This is not an instance of a miscalculation or a misapprehension or a mistake of law or of fact. The application for a stay is denied. You have until tomorrow before you present your first check.

The elevator leads to the Court of Appeals and the clerk's office. Should you wish to make an application (170) to that body, the Court of Appeals is now being alerted that such an application may be made.

It is not in the interests of Yonkers to prolong this. How many weekends should Yonkers spend similar to the last one? There are instances in which delay or the opportunity for cool dispassionate reasoning will alter the circumstances. This is not such an instance. The application is denied.

Mr. Sculnick: Your Honor, may I briefly respond to the court's statements that there is no substantive dispute as to the zoning ordinance?

The Court: Yes.

Mr. Sculnick: At our prior court hearing, I made the city's position clear that we had opposed the entry of the long-term plan order and presented various specific objections to the court and, of course, we stand by those objections. Otherwise the statement is accurate.

The Court: By using the phrase substantive I meant to incorporate that by reference. We will take a brief recess. After which, we will deal with the matter of the individual city coun-

cilmen. May I have the names of the four city councilmen who are subject to these contempt proceedings?

Mr. Sculnick: Vice-mayor Henry Spallone, Minority Leader Longo, Edward Fagan, and Peter Chema.

(171) The Court: We will take a five-minute recess.

Mr. Sculnick: are the councilmen who voted in favor of the ordinance excused from further proceedings? It was our reading of the July 26th order that all council members were required to attend today's session. Are they excused from further proceedings?

The Court: I would think that the magnitude of these proceedings is such—

Mr. Sculnick: They are welcome to attend, but I want to clarify whether or not they are required to attend.

The Court: I won't require them to attend. I would urge that they do so. I can't think of anything more important to the City of Yonkers. If they can personally do so, I think they should. If at some moment, if some matter may arise such as arose a few moments ago in which it might become appropriate to confer with the members of the city council, it would be helpful to have them present. Perhaps a quorum would be needed.

(Recess)

The Court: Mr. Spallone, is he in the courtroom?

(Pause)

The Court: Do you have an attorney?

Mr. Spallone: No, I do not.

The Court: Do you wish to have an attorney?

Mr. Spallone: I would like to have time to get (172) one, but I am prepared to make a statement if I may.

The Court: How much time do you need to get an attorney?

Mr. Spallone: I think I would need at least 24 hours.

The Court: Well, Mr. Spallone, you know you have been on notice for quite some time of the pendency of this.

Mr. Spallone: I am still willing to make a statement. That would be up to you.

The Court: Mr. Spallone, I think that—

Mr. Spallone: Your Honor, I know the consequences and I recognize the position that I am in. And I have been—

The Court: I will adjourn the matter of your contempt until 10 a.m. tomorrow with the understanding and condition that your fines will be, if imposed, will be retroactive to today. Thank you. You may be seated.

Mr. Longo, you are here with counsel I believe.

Mr. Longo: Yes.

The Court: Who represents you?

Mr. Longo: Mr. Sykes.

The Court: Please step forward. You represent whom?

Mr. Sykes: Councilman Longo and Councilman Fagan (173) as well.

The Court: Longo and Fagan. I will hear you with respect to the question why they should not be held in contempt of this court's order of July 26th.

Mr. Sykes: First I would point out to the court that I was retained in this matter early this morning; Consequently I would like to have a reasonable adjournment in order to adequately prepare myself and familiarize myself with this case.

The Court: You see there is or there has to be a realization that we are dealing with an emergency situation here. Now, this order was July 26th. Your clients had ample notice that this motion would come and what the issues would be.

One of the things that we are fighting—and I use that term advisedly—that the court is fighting are the efforts that are made to achieve delay. I will hear you. We will rule on the matter this morning. If thereafter you should believe that there is some legal argument or theory or circumstance which you wish to assert on behalf of your clients which was not available to you this morning, you may make another application and I will hear it.

Mr. Sykes: That is the purpose of this application. I don't think there was any certainty as to (174) which the council would vote particularly with respect to my client Mr. Fagan as

to which the vote was taken last night. I was not aware of the contents of the order.

The Court: I am not faulting you, sir, if you were retained this morning. I am saying that your clients had full opportunity to know this and indeed I believe Mr. Pickelle made it a part of the public record that his office would not represent the individual city councilmen. Do you wish to be heard on the merits on the order to show cause?

Mr. Sykes: Yes, I do. I would reiterate the need to have a reasonable adjournment so that I could adequately represent my clients in this matter.

The Court: I repeat that I will proceed this morning because we are dealing with exigent circumstances and we will reserve to you the right to make any subsequent application to rescind or modify this court's order. You may proceed.

Mr. Sykes: If the court please, I believe the court found in its previous finding that there is no dichotomy between the City of Yonkers and the city council. That could not help one to conclude that finding made by the court with respect to the City of Yonkers could be equally applicable to councilmen Longo and Fagan. However, I believe that the councilmen did not act in bad faith and there was no intentional disregard of the court's order; (175) therefore, they should not be found in contempt.

The Court: When you say they did not act in bad faith, they acted with an intent, did they not, to be in contempt of this court's order? They were on knowledge that that was the consequence of what they did. And good faith or bad faith is really not the issue. The issue is: Did they consciously, deliberately choose to be in contempt of this court's order?

Mr. Sykes: Your Honor, there was substantive basis with respect to the action taken by Councilmen Longo and Fagan inasmuch as the affordable housing ordinance provided more amendments of the zoning ordinances which clearly were defective procedurally and that they denied the planning board's input and also denied the opportunity for a public hearing. And on that basis, the councilmen acted in the manner they did.

The Court: Are you representing to the court that the reason why Councilmen Longo and Fagan among other things voted against the resolution of intent was because of this procedural

defect and that but for this alleged procedural defect, they would have voted in favor of the ordinance? Are you making that representation to the court?

Mr. Sykes: Would the court instruct me with respect to the resolution of the intent, passage of which (176) if I understand it clearly, would have made the affordable housing ordinance a *fait accompli*? If that is the case and there is a procedural defect with respect to the affordable housing ordinance, a *fortiori,* I believe the councilmen are not acting in bad faith if they believe there was a procedural defect with respect to the affordable housing ordinance.

The Court: And the question is: Is that the reason? Do they now want it to be a matter of public record that but for the so-called procedural defect they would vote for the housing ordinance? Is that what they are saying?

Mr. Sykes: Your Honor, I am saying that was a concern they had among others. I think there were several substantive objections that they had to the affordable housing ordinance as well. But in terms of their potential—

The Court: What are they? And did they move to amend it, or did they put forth any suggested changes or modifications?

Mr. Sykes: I am speaking on information and belief. I believe these issues were addressed by Mr. Longo and Mr. Fagan. I am sure the Court is aware of it.

The Court: The court is not aware of a single substantive ojection as the term has been defined in the colloquy with Mr. Sculnick to the affordable housing.

(177) Mr. Sykes: The primary concern is the procedural defect we perceive with respect to the zoning amendment. On that basis my clients acted the way they did. I don't believe the court could find that they were contemptuous in their actions.

The Court: Prior to August 1st, the city council of Yonkers adopted a moratorium with respect to all housing and adopted a resolution to rescind the seminary condemnation proceedings, both of which resolutions I am told counsel for the city council, counsel for the city, advised were unlawful, contrary to the orders of this court and advised that they would take no steps to implement them.

There were no so-called procedural defects with respect to those resolutions, were there?

Mr. Sykes: I am not familiar with that, your Honor.

The Court: Is there anything else you want to tell me?

Mr. Sykes: I just reiterate my request for a reasonable adjournment, your Honor.

The Court: Thank you, Mr. Sykes. Mr. Heffernan.

Mr. Heffernan: Your Honor, on the issue of counsel, it was clear last week as represented to me by Michael Sculnick that the city council persons had been amply informed that the city representatives, namely Mr. (178) Sculnick and Mr. Pickelle, were not going to represent him at this hearing.

They had more than ample notice since frankly this has been going on for two or three weeks that we have been discussing the order and content and what needed to be done for a long time. They knew exactly what needed to be done. They had to pass a resolution last night and they didn't do it.

Quite frankly bad faith, good faith doesn't make much difference. The issue here is: Are they in contempt of the court's order? They are plain and simple. They didn't do it. I don't know if it can be more clear. They are covered under Rule 65 of the Federal Rules. As city council members they are bound by this court's order. In our view there is no question here that they are in contempt.

The Court: Mr. Sussman.

Mr. Sussman: I belief that the motivation for the actions of the council members who are now being discussed was best made clear by their own words frankly rather than having some other representation of what is being said as to their motives.

This morning in the Herald Statesman, Mr. Longo did explain publicly his vote and he said, "It is a typical case of the hypocrisy of the rich and elitist looking down (179) on those who must work for everything they have."

He is quoted as being attributed to him the fact that "The judge's order attacked the quality of life in Yonkers." Mr. Longo made other public statement comparing this court to a dictator. We won't go into all of those. I know the court has seen them.

On the front page of the New York Times Mr. Fagar was asked to explain his vote and I saw him on television last night saying much the same thing. He said his vote "was an act of defiance. The people clearly wanted me to say no to the judge."

Now, with all due respect to Mr. Sykes, I don't really believe for one moment that there is any procedure issue or any other issue here. None was raised at the meeting last night. One of the reasons we sought entry to the meeting is so we could hear the debate and know the position, what was said in the situation.

I believe the court should require the city to produce a tape of the meeting so it can be part of the record so no claim can be advanced without a record that certain things were said and meant and other matters.

The Court: Is there a tape which is in the possession of the control of the city?

Mr. Sculnick: No, your Honor. An outside entity called Cable Vision prepares and produces the tape. (180) The city does not have it.

Mr. Sussman: We are at a very great disadvantage. We can't go to the meeting and can't hear the meeting.

The Court: Can't go to the meeting. Will you explain it?

Mr. Sussman: I think it is important because it—this kind of situation is precisely the difficulty.

Mr. Sculnick: I want to correct my prior statement. I have been advised there is a tape recording of the city council meeting last night that the city has that the city clerk maintains. I was thinking videotape.

The Court: I will deem that to be Court's Exhibit A of today and direct that a copy of it be furnished to the court by the close today, at 4:30, and kept as a court document.

Mr. Sussman: Briefly Mr. Wallace, the branch president called the city mayor's office yesterday in the afternoon and informed him it was the desire of Mr. Wallace and several other branch members to attend the meeting and would like that arrangements could be made so we could attend the meeting. The court is well aware of the atmosphere and the problems with the meeting.

Mr. Wallace called me and indicated that the mayor felt that I shouldn't come to the meeting, etc., and (181) I indicated that I felt given that we were going to be here on contempt, I didn't know if these people were going to take the stand. It was important that I attend the meeting and hear what occurred.

We were directed to report to a certain door between 7 and 7:30 and told we would then be escorted into the meeting. Mr. Wallace, myself, and an associate of my law firm went to that door about 7:25. We were placed literally in physical jeopardy, in significant physical jeopardy.

What occurred was that we waited by this door. A crowd amassed of about 125 or 150 people. Several police cars between us and this jeering crowd. We waited for literally 25 minutes before anyone even came although we were telling the police that we had this arrangement and we assumed they were aware of it. Finally Mr. Sculnick came down and indicated there was no room for us at the meeting. And we waited—

The Court: Mr. Sculnick personally advised you?

Mr. Sussman: Yes.

The Court: That you could not be admitted to the meeting because there was no room?

Mr. Sussman: For us. The TV cameras were going and I said, "I wish this were not a matter of public record." I found it embarrassing for him. It was so ridiculous. I (182) indicated to him having conferred with Mr. Wallace that we had been advised to report to that door at a certain time and that we had been there then for about 20 or 25 minutes, we were subject to all sorts of verbal attacks.

The Court: You were not—

Mr. Sussman: He came back again and told me again after further conference the city felt that we couldn't come to the meeting. There was no room. Now, the point—

The Court: You will have the tape by 4:30 and anybody who wishes will make arrangements. Any counsel in the case may have access to the tape.

Mr. Sussman: I think the point is that the reasons these gentlemen voted the way they did is clear from the public statements. They have no privilege with respect to the statement. They should be held in contempt and fined $500 a day. I dis-

agree and I want to make it part of the record with any adjournment for Mr. Spallone who has been saying for a number of months he wants to defy the judgment. I don't see any basis for any adjournment.

The Court: Mr. Longo, Mr. Fagan, would you step forward, please?

Mr. Longo, you have heard what has been said this morning? Is there anything you wish to say to the court before I make a determination with respect to contempt?

(183) Mr. Longo: Yes, your Honor. I think this is in response to some of the comment made by the counsel, and that is that certainly the citizens of Yonkers ought to be afforded the opportunity of a public hearing. For me to have voted in favor of that ordinance before availing myself of the opportunity of the experts that are employed by the city and by the public would have been wrong. It disenfranchises that public.

The Court: And that the reason for the vote—

Mr. Longo: And that is the reason for voting against the resolution. And it would seem in voting for the resolution it would preclude that input, and I was not favorably disposed to vote in favor of that. There was a public hearing for that ordinance. It was set with no objection by any of the council members. And in my remarks last evening I alluded to the fact that the public was being disenfranchised.

The Court: You are representing to the court that was the reason for your vote?

Mr. Longo: Yes

The Court: Mr. Fagan.

Mr. Fagan: The resolution that was put before us yesterday would have in fact cut out all meaningful public input. And after the resolution passed, it would (184) preclude input and any subsequent changes to what may happen to that resolution. That was the reason for my vote.

The Court: That was the reason for your vote? Are there any other applications on behalf of Councilmen Longo and Fagan other than those that have been stated? Are there any other requests of any nature whatsoever?

Mr. Sykes: Not at this time.

The Court: The court finds that Councilman Longo and Councilman Fagan are in contempt of this court's order of July 26th. The court rejects as a frivolous pretext the claim that a procedural defect under state law is the explanation for their vote.

How much hypocrisy must be occasioned by this litigation? One cannot say one thing to the world at large and make another representation to the court. The court finds there has been ample notice and that the commission of the contempt is beyond dispute. Accordingly, the court finds you, Councilman Longo and you, Councilman Fagan, in contempt and imposes upon you personally a fine of $500 per day every day until such time as you shall have purged yourself from contempt as set forth in the terms of the July 26th order.

The fine shall be payable by a check drawn to the clerk, delivered to the clerk no later than 4:30 on each day that the clerk's office is open to the amount of (185) the fine incurred for the previous day. The provisions pursuant to which you may purge yourself of the contempt are set forth in the order.

You are further personally notified by the court pursuant to the provisions of paragraph 5 of the order that if the necessary legislation is not enacted by on or before August 10, 1988, and I include in that just again to obviate this question of state law and the dates contained in the state law provisions, a resolution of the intent of the city council will be adequate for these purposes. But if it is not enacted, and if such a resolution is not enacted on or about August 10th, then you are subject to commitment on August 11th to the custody of the United States Marshals until such time as you have purged yourself of contempt.

Do you understand?

Mr. Longo: Yes.

Mr. Fagan: Yes.

Mr. Longo: Yes.

Mr. Fagan: Yes, your Honor.

Mr. Sykes: May I be heard? I would make an application for a stay of the court's finding of contempt and imposition of fines.

The Court: Fine is not payable until 4:30 tomorrow. I say to you as I said to Mr. Sculnick, you are (186) certainly free to take the elevator, go up to the Court of Appeals and make your application to that tribunal. The staff of the Court of Appeals has been alerted to the fact such an emergency application will be made; otherwise this court denies the stay.

I may say that, Mr. Sculnick and Mr. Sykes, if the Court of Appeals requires a written order from you denying the stay, prepare such an order and I will sign it forthwith.

Mr. Heffernan: Your Honor, for the record, I would like to note the objection of the United States to any granting of the stay.

Mr. Sussman: NAACP shares that view.

The Court: There remains Mr. Chema.

Mr. Chema: I am represented by my attorney. May I come forward?

The Court: Yes.

Mr. Harmon: I am James Harmon. Good morning, your Honor. My name is James Harmon. I am here, your Honor, for one narrow purpose. I represent one man and as I understand it having also been retained at 8 a.m. this morning, the sole issue is whether there was a willful violation of a lawful order of this court and whether any such violation was committed without justification.

To some degree I feel like I am the man who (187) landed from Mars here this morning after a long history of litigation in this case, being asked to come in and present to your Honor the position of this one man who does not seek notoriety, who is an ordinary person, who fulfills his position as a member of the city council, a part-time position, who otherwise supports his wife and family and who really, your Honor sees no future in martyrdom.

So I come before your Honor asking you to understand that it was not clear until this vote last night that Peter Chema was going to need an attorney this morning.

The Court: I can't accept that. I mean I accept that it was not clear to you. I understand you have just been retained this morning. I didn't mean to be facetious, but the course on

which Yonkers has been headed and has been headed for months has been a very clear course.

This is not the first occasion on which this court has indicated an intent to use its contempt powers should the need arise. You know the nature of the fines, nor should it have been any surprise to any responsible public official that he would have a personal responsibility for his acts. It was very simple.

The issues before the city council yesterday were clear issues. There was a very explicit court order and the alternatives were comply with the court order or not comply and be in contempt. The consequences of being (188) in contempt were spelled out chapter and verse in the court's order of July 26th. So when you say it wasn't clear until this morning, I have to say it was not clear to anyone who is not familiar with these proceedings. But it was crystal clear to anyone who was familiar with these proceedings.

Mr. Harmon: What I mean by my statement, your Honor, is that in theory the order was violated only after a vote was taken. And it was not clear until after the vote was taken that under any set of circumstances there, in fact, your Honor's court order would have been violated.

The Court: As I stated to Mr. Sykes, although this is the preciptating event, the straw that breaks the camel's back so to speak, there is a history here. The Department of Justice was seeking contempt a few weeks ago when the city council adopted two resolutions which it knew, which it had to know were unlawful and in violation of orders of this court.

I don't think they will be heard to say that they are so obtuse as not to have fully appreciated the consequences of their actions.

Mr. Harmon: Yes, your Honor. I think although I must say that I am not deeply familiar with the facts of this case, your Honor, I do have some familiarity with the law of contempt. And I would suggest that it is important (189) here, your Honor, that this clash of constitutional obligation, not in any way works to deprive the rights of this individual, Peter Chema.

I would suggest to your Honor—and I hope your Honor would agree—that it is as important as to how your Honor would reach a conclusion as to Peter Chema as well as to your ultimate decision.

The Court: I think it is an extraordinary circumstance. I know of no parellel for a court to say to elected official, "You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote." I find that extraordinary.

I find it so extraordinary that at great cost in terms of time and in terms of money and energy and implementation of court's orders, I have sought alternatives to that. But they have been unsuccessful. So it came down then to a very simple question last night. And that is regardless of his personal views or personal sentiments, whether he was going to obey a federal court order or defy it. And that is the choice he made as crystal clear as it could be.

Mr. Harmon: We would suggest to your Honor that summary disposition of this contempt, alleged contempt, is not appropriate in this case.

(190) The Court: Now, you have used a procedural term. You are talking about summary disposition. Is there any hearing or other procedure that you seek?

Mr. Harmon: Yes, your Honor.

The Court: What is that? Tell me that.

Mr. Harmon: First of all, we believe and I would cite for the general proposition Ketchen 706 Fed 2d 1266. The constitution provides certain procedural safegurads for the person alleged be be in civil contempt. Among those are right to counsel, counsel adequately prepared to protect his interests, the clear issue of intent and willfulness on his part which can in fact be resolved by his credibility on the witness stand.

In addition, he has a right, we submit, to present witnesses on his behalf.

The Court: Do you wish to hold an evidentiary hearing? Fine. We will hold it forthwith. Does Mr. Chema wish to take the stand?

Mr. Harmon: What I say is my retention by Mr. Chema was at 8 a.m. We are not prepared to make the kinds of judgment

that we think that the constitution permits Mr. Chema to have access to before proceeding before this court.

We respectfully request an adjournment to address and think about it.

The Court: How long do you wish?

(191) Mr. Harmon: Two weeks.

The Court: Denied. You don't wait for two weeks while the house is burning. You don't wait for two weeks when you are told that the bond rating company is going to act within the next day or so or perhaps it has already acted in a fashion which is going to have extremely adverse consequences to Yonkers.

Mr. Harmon: Your Honor, if the court is not inclined to grant a two-week adjournment, we leave it to your Honor to suggest a reasonable adjournment given the entire history of this case.

The Court: Tell me the purpose. Now, Mr. Spallone did not have counsel. I think that very basic right is to have counsel and his request was for an adjournment until tomorrow, and I granted that.

Now, you have made two requests. And you made a request for an evidentiary hearing and I grant that request.

Mr. Harmon: I did not make that request. I requested the opportunity to evaluate as a lawyer should whether or not an evidentiary hearing is required in this case. I certainly can't do that without knowing the facts of the case. So we would like the opportunity to evaluate his position, your Honor.

The Court: But Mr. Chema elected in the face of the July 26th order, in the face of the explicit advice he (192) received from the corporation counsel of the City of Yonkers that he would not be representing him today, to wait until this morning.

Now, I will make the same ruling as I made with respect to Mr. Sykes' application. I am going to proceed this morning in whatever fashion you wish. If you wish an evidentiary hearing, the witness stand is there. Mr. Chema is free to take it and without prejudice to any application you wish to make to re-open the matter based on whatever it is that your further discussions with Mr. Chema or your research indicates.

I think the elements of contempt are very clear. There is no question that there has been notice. There is no question but that there has been a specific order of the court, and there is no question that there has been a failure to comply with that order. There is the opportunity now to be heard. The time and place of this hearing was scheduled on the 26th of July.

Mr. Harmon: I appreciate the opportunity that the court has given us this morning, your Honor, but I must say also in good conscience that we would not be able to adequately represent Mr. Chema's interests given the short notice to his counsel.

The Court: I just want to say again that the shortness of that notice is the result of Mr. Chema's (193) decision not to seek counsel until this morning. It is not a failure on the part of the court or of the parties to give Mr. Chema ample notice of what the issues would be this morning.

Mr. Harmon: If the court, therefore, is inclined to go ahead, fine. It sounds to me the court is inclined to go ahead.

The Court: You got that message.

Mr. Harmon: Even if you just landed from Mars at 8 a.m. this morning, it doesn't take long to get that message.

The Court: Because the people of Yonkers are entitled to have these matters end, not to have this drain, this emotional, fiscal drain. You have got to create a community in which people can live together. And this is creating a community in which you have a different circumstance.

The complaint was filed in 1980. It is always the case that when counsel comes in late in the case and the reaction is, "What is the great rush?" The great rush. It may appear to be a great rush to somebody who is retained at 8 a.m. on August 2nd, but to the people whose constitutional rights have been violated and who have been waiting for years for a vindication of those rights for redress and remedy, there hasn't been a great rush in this (194) case.

Mr. Harmon: I understand that I am bearing the burden here of a lengthy history of this case, your Honor. We would also again argue that the contempt such as it may have been did not occur until sometime last night.

The Court: I want to make it clear again because I don't want in any other procedural context there to be any ambiguity

about that. To the extent that you request an evidentiary hearing, that request is granted. What is denied is the request for a two-week adjournment.

Mr. Harmon: To the extent you are inclined to go ahead, when the court does deal in civil contempt and sanctions under contempt, you are dealing with human dynamics and the effect of the coercive power of the court and what response that course of power may engender.

You have talked here I think very directly and eloquently here this morning about the other remedies open, options to other public officials to take action which apparently they have not done as of this point in time. You have also gone ahead and imposed a serious civil contempt sanction on the City of Yonkers.

It seems to me that although that civil contempt sanction is directed at the city itself, there is nothing that says that this contempt sanction can't have a really personal result on public officials themselves. So that—

(195) The Court: Personal result?

Mr. Harmon: Yes.

The Court: Personal responsibility. It is a human being that casts a vote. It is a human being who has taken an oath to protect and defend the consitution. Of course, it is personal. We deal with human beings fortunately.

Mr. Harmon: What I would suggest here, your Honor, is that this court allow the impact of the civil contempt fine imposed upon the City of Yonkers to have its impact and to run its course—

The Court: You see the little pas de deaux? The city is saying, "It is not our responsibility. It is the city council." And the city councilmen are saying, "Let the impact on the city run its course", and in the meantime, the housing isn't being built.

Mr. Harmon: We suggest what is the purpose of civil contempt? To have the coercive effect of the court's sanction and order produce the result that the court wants.

The Court: Mr. Chema as you know has the opportunity to purge himself of contempt as sert forth very explicitly in the order, so that it is not the circumstance that he has no alterna-

tive. He has a very clear alternative. Indeed the purpose of civil contempt is for there to be the alternative of compliance.

(196) Mr. Harmon: We would ask that the court withhold any action with regard to judging Mr. Chema in contempt or imposing sanctions under a contempt order until the imposition of the fine against the City of Yonkers has had some opportunity to be tested. Other than that, your Honor, other than what I have already stated, we simply are not in a position to make a judgment as to whether or not Mr. Chema's interests both factually and legally are best served here by an evidentiary hearing.

We certainly know that it is not possible for us to address the legal issues that are raised here in such a short period of time. That concludes my statements.

The Court: Mr. Heffernan.

Mr. Heffernan: Your Honor, with regard to Mr. Chema, I don't think there is any difference between him and his vote last night and any of the other city council persons who voted against the resolution. From our perspective, they are clearly in contempt of an unambiguous court order. Your Honor, I didn't land from Mars this morning. I have been on this case for going on a year now—

The Court: You are a novice.

Mr. Heffernan: And I recognize that compared to the eight or more years of experience that some of the people in this courtroom have had in this case, that is not much. It has been long enough to learn a few things. It (197) has been long enough to ask the question before practically every hearing we have here, what is going to come up that is going to delay the thing further?

I hadn't thought of this one, your Honor. Now they come in this morning, the city council people, and make this claim that they haven't had a chance to consult with counsel. It is a ridiculous claim. They have been well aware of what is going on here. They knew they may need counsel as little as a week ago and probably a lot longer than that. So from our point of view, your Honor, the claim is simply pretext.

Mr. Hamon may have landed from Mars this morning at 8 o'clock, but it didn't take him long to come up with an argu-

ment that we heard on many occasions. Put the blame on the other guys. We shouldn't be accountable. We heard it a lot in the last several weeks.

The claim is basically let the city take the blame. Let the city pay the price for it. But why should city council members pay a price for it? After all they are only human? They are human. They are answerable to this court. They are answerable to the city. They are bound by this court's order.

There should be contempt sanctions. There is no doubt there is contempt. It should lie against Mr. Chema just as it should lie against any city councilperson (198) who voted against the resolution last night.

The Court: Mr. Sussman.

Mr. Sussman: Judge, I have two sets of comments. First of all, I just think for the purpose of the record it should be made clear that Mr. Chema was one of the two council members—and there are only two counsel members who voted on January 27, 1988, against the entry of the consent decree, against the long-term plan. And since that day, Mr. Chema to my knowledge, and I think the record would bear this out, has voted against every measure or voted in favor of many measures which have been intended to frustrate this court.

He has been quoted publicly on numerous occasions including in the last two weeks as saying that he would vote against this resolution at the point then in time that it was in fact an ordinance and not simply a resolution.

The Court: You are making this argument with respect to adequacy of time to obtain counsel?

Mr. Sussman: That is corrrect. And put it in some context of his frame of mind which can be derived from those votes. He is not a late convert to opposition here nor a late convert to knowledge of his acts which are contemptous of the court.

That to one side, I think we should have more (199) clarity frankly on the record as to precisely what the procedural status of Mr. Chema and perhaps the others, Mr. Spallone and gentlemen represented by Mr. Sykes, what their status should be.

It seems to me that the way it ought to be left is very simple. The court having given those who are represented by counsel an opportunity to be heard should be explicit and state that

should they demand an evidentiary hearing within a time period that is set after consultation, the court is prepared upon hearing the evidence that is presented to revisit the question and contrary to the procedure which was made clear, in fact refund any fines paid if in fact these people can show that they should not have been held in contempt. So that there is no question that procedurally their rights are protected.

They are not ready for evidentiary hearings today although they ought to be. I don't believe any such hearings will be held. I don't believe they will shed light on the contempt, maybe they would. The court should not be open to any procedural ambiguity. We know these things are going to be taken up and questions as to what the court was prepared to do.

In a prior case frankly where no evidentiary hearing was requested, we got to the Court of Appeals and there was a question why there was no evidentiary hearing. (200) That put me in a position of opposing the position and supporting the movant for a hearing in order to protect ourselves.

If these people want a hearing I believe by end of this week, it should be set. They should come in and the court should be on record as stating that their contempt if it is shown not to have been actual, any fines paid will be refunded.

The Court: Let me first of all say I am going to ask that the Department of Justice and NAACP prepare this morning—it can be in handwriting—a written order so that there will be a written, signed order for appellate purposes.

I will direct that the checks given by the individual councilmen be held by the clerk of the court for ten days, that is, until August 12th so that should there be reasons between now and August 12th to set aside the contempt, that power will exist. Let me make clear my intent with respect to that. If after an evidentiary hearing, I conclude that the city councilmen in fact were never in contempt, then the checks will be returned; but if I conclude that he was in contempt this morning, but was not in contempt or took remedial action, purged himself subsequently, then the checks will indeed be deposited.

Mr. Sussman: I think that is entirely (201) defensible. I think counsel should be advised it is within that period that they have

to that they must come in, rather than coming in on the 11th day and raising a question that it wasn't clear.

The Court: I would think we should set a more specific timetable. Mr. Spallone has until 10 a.m. tomorrow. Mr. Sykes. And Mr. Harmon, the only request that you made was for two weeks and that is unacceptable. Do you want to pinpoint a specific date?

Mr. Harmon: Yes, I think considering the lengthy history to this case, I think one week would give us our best opportunity under the circumstances.

Mr. Sykes: If I understand the court correctly are we to be afforded an evidentiary hearing?

The Court: You haven't requested an evidentiary hearing. Are you now requesting an evidentiary hearing?

Mr. Sykes: I am trying to understand what the court's statement indicated or is granting.

The Court: The law of contempt gives to your clients various procedural rights, notice, opportunity to be heard and the notice for a hearing. If you are making a request for a hearing, then we will set a timetable for it. If you want an opportunity to consider whether you are making a request for a hearing, we will give you that. Suppose we say 4:30 this Friday this court is to be advised (202) in writing by counsel for Chema, Longo, and Fagan whether they wish an evidentiary hearing.

If there is to be an evidentiary hearing, we will hold it on August 8th at 10 a.m. That is the following Monday. As I have already indicated, the clerk's office will hold the checks until August 12th.

Let's understand so that we don't expend needless time and energy what the nature of that hearing will be. I heard references to calling witnesses and so on. And if there are witnesses to the state of mind of Mr. Chema, then perhaps they can testify. I am not quite sure how that happens.

We are not retrying United States against Yonkers. We spent over 80 trial days doing that, nor are we trying the pros and cons of various means of creating housing. What we would be hearing at the evidentiary hearing relates to whether there is contempt, that is, whether in fact the councilmen voted in the way this court has been told they voted. That is the first ques-

tion. The second question is whether that constitutes a violation of the July 26th order of the court and the third would be any mitigating circumstance.

Let's define mitigating circumstance. Political pressure, constituent pressure, fear of unpopularity, fear of physical threats or safety, none of those are mitigating (203) circumstances. I am hard put and I will leave it to the ingenuity of counsel to think of what a mitigating circumstance might be, but we are available and we will hold such a hearing if requested in writing prior to 4:30 this Friday. Please respond in any event. That is, if there is no request for a hearing, let me have that in writing. If there is a request for a hearing, let me have that in writing.

Mr. Sussman: I agree with Mr. Heffernan and I think that the time for Mr. Chema to be held in contempt pending any such request is now. I don't see any possible defense. I think the history of his actions has been contemptuous and it didn't just start last night.

The Court: Mr. Chema, would you come forward please?

Mr. Harmon: May I make this representation to the court, if we make a judgment in advance of Friday at 4:30 there is no need from our point of view for an evidentiary hearing. I will let your Honor's chambers know as well as counsel.

The Court: That would be helpful.

Mr. Harmon: And if we decide to proceed on a legal analysis, we will advise your chambers and counsel for the government and the NAACP.

The Court: Thank you. I am told that for (204) portions of these proceedings one city council member was not present in the courtroom. I will assume that his colleagues will apprise him of all that has transpired in his absence.

Mr. Chema, you have heard what has happened this morning. The fact is, is it not, that you received notice of these proceedings and of the court's order and that you voted yesterday in the manner which has been represented?

Mr. Chema: Yes.

The Court: Is there anything you wish to say?

Mr. Chema: No, your Honor.

The Court: The court finds that you are in contempt. The court finds that there was adequate notice, that there was an

opportunity to be heard, and that there is no question but that there has been contempt.

As I have indicated I will direct the clerk to hold until August 12th the checks which you are to furnish on a daily basis beginning tomorrow and I will afford to you and your counsel if you request an evidentiary hearing.

I act now rather than wait until some later date because I perceive this to be a situation which requires immediate action and I cannot tolerate anything with smacks of dilatory proceedings.

Is Mr. Spallone in the courtroom? Mr. Marshal, (205) would you see if Mr. Spallone is in the hallway?

(Pause)

The Court: I don't think I will await Mr. Spallone's pleasure, but I would appreciate it if counsel would advise him of the scheduling that has been made with respect to the other city council members. I ask that he advise chambers, that his counsel advise chambers whether he wishes to proceed tomorrow morning as originally scheduled or to proceed next Monday.

Is there anything else? I would appreciate the preparation of a formal order embodying these rulings. Long hand will be sufficient.

Mr. Sculnick: Your Honor, I would like to request a meeting with the court in the jury room with all counsel at the conclusion of this. I have an application to make and then we can go back on the record.

The Court: Yes. We will adjourn and I will see counsel in the jury room.

(Recess)

The Clerk: Ladies and gentlemen, that concludes the proceedings for today.

EXHIBIT D—Long Term Plan Order of United States District Court for the Southern District of New York, Dated June 13, 1988.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION,

Defendants.

80 Civ 6761 (LBS)

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating to the imple-

mentation of the long-term Goal[1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the Court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this Court to enter their proposal. Having reviewed these submissions, and the response of the City thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17 (a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development. In instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus

[1]All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described in clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such section does not exceed the number of assisted units allocated to households described in clause (b) of such section; and (iii) to households described in clause (d) of such Section does not exceed one-third (rounded to the nearest whole number) of the number of assisted units allocated to households described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total number of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units may be one-bedroom.

SECTION 2. *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses) located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Imple-

mentation (see below) and the City shall seek, to the extent possible consistent with the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartments buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently zoned MG, M, A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

SECTION 4. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of purchase, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are rerented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted hous-

ing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

Section 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the fore-

going, no proposed housing development containing assisted units shall in any way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process. solely because it proposes to offer assisted housing units for rental rather than for sale.

Section 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

Section 7. *Staging.* Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

Percentage of Market Rate Units Receiving Certificates of Occupancy	**Percentage of Assisted Units Receiving Certificates of Occupancy**
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

[2]Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

Section 8. *Mandated Incentives.* Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing-market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real-estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatement to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real-estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9 depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this Court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) on (i) site-improvement projects (i.e.

site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall such funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.*

The City may provide (on a project-by-project basis, on an area-wide basis or otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the assisted housing goals set forth in either clause (b) or (c) of Section 15 of the First Decree for every two units of assisted housing (allocated to households in the income group for which credit is claimed) constructed in such areas, up to a maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.*

(a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation Office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such Office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to implement such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation Office shall not exercise the power of other City agencies. Moreover, the administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing Office shall be responsible for formulating and presenting for approval and funding a budget for such Office, as well as for the hiring and firing of the employees of such Office.

SECTION 12. *"Section 8" Certificates.* The City shall consider in good faith any plans for assisting eligible families in

utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff-intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

LEONARD B. SAND,
U. S. D. J.

DATE: 6/13/88

EXHIBIT E—Opinion of United States Court of Appeals for the Second Circuit, Dated August 26, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1679-1682—August Term 1987

Argued: August 17, 1988 Decided: August 26, 1988

Docket Nos. 88-6178, -6184, -6188, -6190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—and—

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Intervenors-Appellees,

—v.—

CITY OF YONKERS,

Defendant-Contemnor-Appellant,

YONKERS BOARD OF EDUCATION and
YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

In the Matter of HENRY SPALLONE, PETER CHEMA, NICHOLAS LONGO, and EDWARD FAGAN,

Contemnors-Appellants.

Before:

NEWMAN, MINER, and MAHONEY,
Circuit Judges.

Appeals from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City of Yonkers and four council members in civil contempt and imposing coercive monetary sanctions for failure to comply with a court order implementing a consent judgment.

Affirmed as to the council members; affirmed, as modified, as to the City.

MICHAEL W. SCULNICK, New York, N.Y. (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, N.Y.; Rex E. Lee, Carter G. Phillips, Sidley & Austin, Wash., D.C.; Paul W. Pickelle, Corp. Counsel, Yonkers, N.Y., on the brief), *for defendant-contemnor-appellant.*

ANTHONY J. MERCORELLA, New York, N.Y. (Vincent R. Fontana, James L. Fischer, Vincent R. Cappucci, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, N.Y., on the brief), *for contemnor-appellant Spallone.*

JAMES D. HARMON, Jr., New York, N.Y. (Barry G. Saretsky, Martin S. Kaufman, Michael J. Eng, Aaron F. Fishbein, Bower & Gardner, New York, N.Y., on the brief), *for contemnor-appellant Chema.*

LAWRENCE R. SYKES, Yonkers, N.Y., *for contemnors-appellants Longo and Fagan.*

LINDA F. THOME, Dept. of Justice, Wash., D.C. (Wm. Bradford Reynolds, Asst. Atty. Gen., Mark R. Disler, Deputy Asst. Atty. Gen., David K. Flynn, Dept. of Justice, Wash., D.C., on the brief), *for plaintiff-appellee.*

MICHAEL H. SUSSMAN, Yonkers, N.Y. (Sussman & Sussman, Yonkers, N.Y., on the brief), *for plaintiffs-intervenors-appellees.*

JON O. NEWMAN, *Circuit Judge*:

This appeal presents important issues concerning the enforcement of orders of a United States District Court requiring action by a municipality to remedy violations of the Constitution and statutes of the United States. The principal issues are whether members of the Yonkers City Council may be required to vote to implement remedies contained in a consent judgment agreed to by the City and approved by the City Council, and whether the City, in addition to the council members, may be subjected to the coercive sanctions of civil contempt when the agreed upon legislative action has not been taken. The issues arise on

appeals by the City of Yonkers and four members of the Yonkers City Council from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City and the council members in civil contempt and imposing coercive sanctions. We conclude that under the circumstances of this case the recalcitrant council members may be required to vote to implement the consent judgment and that the City, in addition to the council members, may be adjudicated in contempt and subjected to coercive sanctions for failure to abide by the consent judgment and subsequent implementing orders of the District Court. We also conclude that the amount of the monetary sanctions imposed on the City, though properly substantial, should be somewhat reduced. We therefore affirm the order adjudicating the council members in contempt and affirm, as modified, the order adjudicating the City in contempt.

Background

1. The Underlying Lawsuit

The United States filed the underlying lawsuit on December 1, 1980, against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. The complaint made two basic allegations: (a) that the City and the Community Development Agency had "intentionally . . . perpetuated and seriously aggravated residential racial segregation" in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982), and (b) that the racial segregation in the City's public schools had been "caused in substantial part by intentional, racially discriminatory acts and omissions" of the City and the Board of Education in violation of the Constitu-

tion. The National Association for the Advancement of Colored People (NAACP) was granted leave to intervene, and the suit was subsequently certified as a class action on behalf of all Black residents of Yonkers who currently reside in or are eligible to reside in publicly assisted housing or who are parents of children attending Yonkers public schools.

After a bench trial lasting ninety days over the course of fourteen months in 1983 and 1984, the District Court found the City and the Community Development Agency liable for intentional housing segregation and found the City and the Board of Education liable for intentional school segregation. *United States v. Yonkers Board of Education*, 624 F. Supp. 1276-1553 (S.D.N.Y. 1985). With respect to the housing violations, with which we are concerned on this appeal, the District Court found that the City had deliberately concentrated virtually all of its public and other subsidized housing in the southwest quadrant of Yonkers and had done so to maintain residential segregation. *Id.* at 1372-76. After conducting a six-day hearing as to appropriate remedies, the District Court issued a Housing Remedy Order on May 28, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[1]

The Housing Remedy Order included provisions for the construction of 200 units of public housing and for the planning of additional units of subsidized housing. The City had previously agreed to provide acceptable sites for the 200 units of public housing as a condition of receiving its 1983 Community Development Block Grant from the

1 An order providing a remedy for the school segregation violation was issued May 13, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986)

United States Department of Housing and Urban Development (HUD). Part IV of the Housing Remedy Order established a precise timetable within which the City was required to furnish HUD with necessary documents to secure HUD's approval of funds for the 200 units. *Id.* at 1580-81. The City was required to propose sites for 140 units within thirty days and sites for the remaining 60 units within ninety days.

Part VI of the Housing Remedy Order accorded the City broad discretion to make its own determinations concerning additional units of subsidized housing. The District Court did not specify the number of units to be built, the time by which they must be built, or the degree of subsidization. Part VI contained essentially two requirements. First, the additional units must be located in existing residential areas in east or northwest Yonkers. Second, the City must prepare a plan specifying, among other things, the number of subsidized units to be constructed or acquired, their location, and the rent levels or degree of subsidization. *Id.* at 1582. The City was given until November 15, 1986, nearly six months, to present its plan.

This Court affirmed the liability and remedy rulings of the District Court on December 28, 1987. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), and the Supreme Court denied the City's petition for a writ of certiorari. 108 S. Ct. 2821 (1988). None of the requirements of the Housing Remedy Order was stayed during the course of appellate review.

2. Attempts to Implement the Housing Remedy Order

With respect to the requirement to propose sites for the 200 units of public housing within thirty and ninety days, the City totally defaulted. No site was proposed. With

respect to the requirement to submit a plan within six months for additional subsidized housing, the City again totally defaulted. On the appointed day, November 15, 1986, the City informed the District Court that it would not comply. The United States and the NAACP then moved for an adjudication of civil contempt and the imposition of coercive sanctions. Rather than proceed immediately to consideration of contempt sanctions, the District Court patiently endeavored to secure voluntary compliance. In February 1987 the City Council agreed to the appointment of an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for the additional units of subsidized housing. Throughout the rest of 1987 attention was focused primarily on the requirement for proceeding with the 200 units of public housing. The Advisor recommended placing the 200 units in small clusters on scattered sites. In April 1987 the City Council proposed to place the 200 units on twelve sites but rendered the proposal illusory by conditioning it on the patently unacceptable right of local civic associations to select the tenants. By the end of 1987 the City had taken no significant action to comply with the 1986 Housing Remedy Order.

In January 1988, following this Court's affirmance of the liability and remedy decisions and with the District Court contemplating designation of sites for the 200 units, the parties began negotiations to settle the compliance issues. On January 19, when prospects for agreement appeared bleak, the District Court pointed out to the City that the Court could proceed either by "deeming things to have been done which it was the obligation of Yonkers to do, or it can order Yonkers to do those things." On January 25, counsel for the City informed the Court that the City was contemplating a consent judgment and that the

City was prepared to designate seven sites for the 200 units of public housing and to implement a long-term plan to achieve the goal of 800 units of subsidized housing that had been recommended by the plaintiffs. A consent decree was agreed to by the parties that same day, approved by the City Council on January 27, and entered as a consent judgment of the District Court on January 28 ("the Consent Judgment").

With respect to the 200 units of public housing, the Consent Judgment renewed the City's commitment to build the units and identified seven specific sites. The judgment also committed the City to take specific steps within a prescribed timetable to have the 200 units built. Finally, the City pledged that it would not seek further review of the District Court's 1986 decision or any subsequently entered decree to the extent that such decrees relate to the 200 units.

With respect to the 800 units of subsidized housing, the Consent Judgment included several provisions, which are at the core of the pending appeal. First, the City acknowledged that the goal of 800 units was "an appropriate target in fulfilling its obligations pursuant to Part VI" of the Housing Remedy Order. Consent Judgment § 12. Next, the City pledged to make good-faith efforts to achieve 600 of the units in annual installments of 200 units within each of the next three years. *Id.* Next, and of special significance, the City agreed to adopt "legislation" on a number of topics to facilitate meeting the goal of 800 units of subsidized housing. *Id.* § 17. Among other things, the City agreed to adopt legislation granting necessary tax abatements, providing for zoning changes, and establishing, within ninety days, a package of incentives for local development. *Id.* § 17(b), (d), (e). Finally, the City agreed with

the other parties to work diligently to agree on various unresolved matters primarily concerning financial aspects of the 800 units and to submit a second consent decree to the Court by February 15, 1988. *Id.* § 18.

Rather than abide by the terms of the Consent Judgment, the City promptly attempted to disavow it. Citing intense community opposition to the Consent Judgment, especially the public housing provisions, the City moved on March 21, 1988, to delete the provision in which it had agreed not to seek further appellate review concerning the obligation to build the 200 units. To demonstrate the lengths to which it was prepared to go to be relieved of its public housing commitment, the City offered to return approximately $30 million of federal funds in the event the Supreme Court should set aside the public housing provisions of the Housing Remedy Order. The City's motion to amend the Consent Judgment was denied on March 31, and that ruling has not been appealed.

On April 12, at a chambers conference with the District Court, the City announced that it was "not interested" in completing negotiations on the terms of a long-term plan for the 800 units of subsidized housing, as required by section 18 of the Consent Judgment. In light of this development, the United States and the NAACP submitted to the Court on May 2 a proposed Long Term Plan Order based largely on a draft that had been prepared by the City's lawyers during the negotiations that had ensued prior to April 12. The City opposed the proposed order and noted specific objections. The District Court directed the plaintiffs to revise their proposed Long Term Plan Order in light of the City's objections. On June 13, following a hearing and further changes, the District Court entered the Long Term Plan Order. As revised by the parties and by

the Court, the Long Term Plan Order accommodated most of the City's objections. The Order provided considerable detail for the legislation that the City had committed itself to adopt in section 17 of the Consent Judgment.

By the time the Long Term Plan Order was entered, the City was one month in default on the obligation, agreed to in the Consent Judgment, to adopt implementing legislation. The United States therefore asked the Court to set a timetable for enactment of the legislation. On June 21 counsel for the City informed the Court that a consulting firm had been retained to draft the legislation and that City Council action could be anticipated at the next council meeting, perhaps in August. Concerned about the prospect of delay, a concern heightened by the City Council's adoption on June 14 of a resolution declaring a moratorium on all public housing in Yonkers, the District Court requested that the City Council pass a resolution adopting the provisions of the Long Term Plan Order. On June 28 the City Council voted against a resolution "indicating [the Council's] commitment to the implementation of" the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order.

The following day the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable, violation of which would subject the City to contempt sanctions. In response to the plaintiffs' proposed order setting forth such a timetable, the City argued that the defeat of the resolution on June 28 indicated that the City would not voluntarily adopt legislation contemplated by the Long Term Plan Order and suggested that the Court itself should enter an order adopting the necessary legislation. At a hearing on the proposed timetable on July 12, the

District Court invited the parties' comments on the possible creation by the Court of an Affordable Housing Commission to exercise the City Council's functions concerning implementation of the housing remedy orders. The City opposed creation of the Commission because it would divest the Council of its "core legislative as well as executive functions."

3. The Prospect of Contempt

Prior to this point in the litigation, the District Court had on at least two occasions warned the City that it would face a contempt adjudication and coercive sanctions if it failed to abide by the Consent Judgment. On July 26 the District Court issued an order that gave the City one final opportunity to comply and detailed the precise consequences of continued noncompliance. The July 26 order required the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [Consent Judgment] and the Long Term Plan Order." The "legislative package" was set forth in a detailed Affordable Housing Ordinance, which had been drafted by the City's consultants and marked as an exhibit at the July 26 hearing.

The July 26 order also established the schedule and consequences of civil contempt proceedings to occur in the event that the legislation was not adopted by August 1. If that occurred, the City and the council members were to show cause at 10:00 a.m., August 2, why they should not be adjudged in contempt. If such cause was not shown, each council member failing to vote for such legislation would be fined $500 per day, and, if the legislation was not passed by August 10, such council member would be imprisoned on August 11. The contempt sanction against the City would be daily fines starting at $100 on August 2

and doubling in amount each day of continued noncompliance. The cumulative total of the fines against the City would exceed $10,000 by day 7, exceed $1 million by day 14, exceed $200 million by day 21, and exceed $26 billion by day 28. The order provided that a council member could be purged of contempt by voting in favor of the legislation or by enactment of the legislation. The City could be purged of contempt by enactment of the legislation. The order further provided that all fines would be paid into the Treasury of the United States and would not be refundable, that the Council would meet at least once a week to vote on the legislative package, and that any incarcerated council member would be released to attend such meetings.

On July 28, the District Court informed all counsel by letter that the July 26 order "will be satisfied if the City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This letter responded to the City's expressed concern that state law specified notice and public hearing requirements in connection with enactment of zoning ordinances.

On August 1, the City Council met to consider a resolution expressing the Council's intent to adopt the Affordable Housing Ordinance within the minimum time prescribed by state law. The Council defeated the resolution by a vote of four to three.

4. The Contempt Adjudications

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and the council members an opportunity to show cause why they

should not be adjudicated in civil contempt. Counsel for the City reported that the City Council had taken two actions the previous night. First, the Council had scheduled a public hearing for August 15, thereby giving the required state law notice of a hearing on a proposed zoning ordinance. Second, the Council had defeated the resolution of intent to adopt the Affordable Housing Ordinance. With respect to contempt, the City made essentially three points. First, counsel argued that the City was powerless to compel the dissenting council members to vote in favor of the Affordable Housing Ordinance. Second, he urged the Court to order the legislation into effect, rather than hold the City in contempt. Third, he pointed out that the fines were punitive since the escalating amount of the fines would place the City in bankruptcy in three weeks.

The District Court rejected these contentions. The Court noted that the City had failed to discharge its responsibilities to comply with the orders of the Court. The City had not applied to the Emergency Financial Control Board to take action or requested action by the Governor of New York. The Control Board was created to oversee Yonkers' financial condition and has an array of powers with respect to the City's financial affairs. 1984 N.Y. Laws ch. 103. Under the Yonkers City Charter, any elected officer may be removed from office by the Governor for "misconduct." Yonkers City Charter § C(2)-5. The Court was informed that the City had requested the Governor to use his "good offices" but had not requested him to "exercise powers and responsibilities he has as the governor of the state under the circumstances that now obtain." The Court also pointed out that by offering to have judgment of approximately $30 million entered against it as a means of avoiding its long-standing commit-

ment to build the 200 units of public housing, the City had "crossed the line of any form of fiscal or other governmental responsibility."

Concerning the suggestion that the Court, rather than the City, adopt the Affordable Housing Ordinance, the Court observed:

> [Th]ere does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Finally, the Court rejected the claim that the contempt sanctions were punitive:

> What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day is not going to bankrupt Yonkers. The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

The Court held the City in contempt, imposed the coercive sanctions set forth in the July 26 order, and entered written findings of fact.

The District Court then considered the four council members who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, Nicholas Longo, Edward Fagan, Peter Chema, and Henry Spallone. Counsel for Longo and Fagan requested an adjournment to familiarize himself with the case. The District Court denied the request, expressing the view that the council members had been on notice since July 26 of the prospect they faced and the need to have counsel. The Court stated that it would proceed with the contempt adjudication but would afford counsel the opportunity at a later time to be heard with respect to any theory or circumstance not available at this time. Counsel then asserted that his clients had not acted in bad faith and contended that they had opposed the resolution of intent because adoption of the Affordable Housing Ordinance would have violated state law requirements for notice and hearing of zoning changes. When the Court inquired whether counsel was representing that but for the claimed procedural defect, the council members would have voted for the resolution, no such assurance was given. Nor was such assurance given when Longo and Fagan each addressed the Court directly.

Counsel for Chema requested a two-week adjournment, which was denied. The District Court again stated its determination to proceed that day but afforded counsel the opportunity to reopen the matter thereafter. The Court also offered the opportunity for an immediate evidentiary hearing, which was declined. The Court then ascertained from Chema that he had received notice of the July 26 order and had voted against the resolution of intent the previous evening.

The District Court found Longo, Fagan, and Chema in contempt and imposed the sanctions set forth in the July

26 order. The Court also stated that, if any contemnor wished an evidentiary hearing, such request should be made by August 5 and that a hearing, if requested, would be held August 8. The Court again stated that "to obviate this question of state law and the dates contained in the state law provision" a vote in favor of a resolution of intent would constitute a purging of the contempt.

The fourth council member, Spallone, appeared without counsel and requested and was granted 24 hours to retain counsel. Spallone appeared with counsel at a hearing on August 4. At that time his counsel acknowledged that there was no factual issue in dispute. Counsel contended that his client could not be found in contempt because a legislator had an "unfettered" right to vote as he wishes. Counsel also urged that if the Court's order was violated, "it was done by the coun[ci]l corporate body per se." Finally, reversing the contention of the City, he urged the Court to "[p]unish the City of Yonkers, but don't punish my client."

The District Court found Spallone in contempt and made the finding retroactive to August 2.[2] By August 5 all four council members had informed the District Court that no evidentiary hearing was sought.

The District Court denied requests for stays by the City and the four council members. On August 9, after fines for seven days had become due, this Court stayed the contempt sanctions and ordered an expedited appeal. At the hearing of that appeal on August 17, the Court was informed that the public hearing noticed by the City Council on August 1 had been held on August 15. We were

2 Spallone has not challenged on appeal the retroactive aspects of the civil contempt sanction imposed upon him, and we decline to consider the issue *sua sponte*.

also informed that at the August 15 meeting the Council voted against the Affordable Housing Ordinance by a vote of four to three.

Discussion

A. The Council Members

1. Procedural Objections

The four council members contend that their contempt adjudications occurred without observance of the procedural protections of the Due Process Clause and those normally required for civil contempt proceedings. They contend that the proceedings were not initiated by orders to show cause, that they received inadequate notice of the charges, that their counsel were denied a reasonable time to prepare their defense, that issues concerning intent were not sufficiently explored, that the United States was not obliged to sustain its burden of proof, and that the judgments of contempt fail to identify the precise order violated.

A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. *See In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982); *In re Di Bella*, 518 F.2d 955 (2d Cir. 1975); *see also* Rule 43(a) of the Rules of the Southern and Eastern Districts of New York.

With one exception, procedural requirements were fully observed. The order of July 26 served as a show cause order, giving the council members notice that in the event of a failure to comply with the requirements of that order, they would be obliged to show cause why they should not

be adjudicated in contempt for such failure. The order went even further than required by alerting the council members beforehand as to the precise sanctions that would be imposed in the event of noncompliance. Though the council members were not then defendants in the litigation, as officers of the defendant City, *see* N.Y. Pub. Off. Law § 2 (McKinney 1988), they were bound by that order and all of the injunction orders issued against the City, *see* Fed. R. Civ. P. 65(d), even without notice of them, *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987). In any event, the District Court required the City to post the July 26 order conspicuously, and none of the council members contends that he was not aware of its requirements.

Each council member appeared with counsel, and each was accorded an opportunity to present evidence and legal argument. The need for the plaintiffs to present evidence to sustain their burden of proof was obviated by the City's representation, undisputed by any of the four council members, that each had voted against the resolution of intention at the August 1 meeting of the City Council. As to the alleged lack of precision as to the precise order violated, the District Court's oral and written rulings specify that the council members are adjudged in contempt for violation of the July 26 order. Defendants contend that they are uncertain whether they have been cited for failing to vote in favor of the Affordable Housing Ordinance or for voting against the resolution of intention to adopt that ordinance. The action required of them by the July 26 order was to vote in favor of the Affordable Housing Ordinance. They failed to do so on August 1 and were found to be in contempt for that failure. The resolution of intention was a device offered by the District Court as a

means of satisfying the July 26 order while still observing the notice and hearing time requirements of state law. The vote against that resolution was clear evidence that the four council members were unwilling to obey the requirements of the July 26 order.

Of more substantial concern is the complaint that counsel were given inadequate time to present a defense. We are not persuaded by the District Court's point that the order of July 26 provided the council members time to retain counsel and time for counsel to become prepared in the event that noncompliance occurred on August 1. A council member is not obliged to retain counsel in advance of the occasion when his action may subject him to contempt, especially in the circumstances of this case, where the affirmative vote of any one of the four council members would have meant that none faced contempt.

We think it would have been preferable, even in the face of the protracted defiance demonstrated on this record, for the District Court to have accorded counsel at least a few days to prepare their defenses. Nevertheless, we see no basis for concluding that the promptness of the adjudications warrants setting them aside. None of the four contemnors sought the opportunity that was afforded them of pursuing an evidentiary hearing. There were no factual disputes to be resolved. Counsel were impaired, at most, in their ability to develop their contentions of law. Since, as will appear, we agree that all such contentions, now fully briefed and argued, are without merit, it would be idle to return the matter to the District Court to renew rulings that we are today holding were entirely correct.

2. Abuse of Discretion

In different ways the council members contend that the District Court exceeded its discretion in adjudicating them in contempt. One argument is that the Court on July 26 should not have directed the council members to vote for the Affordable Housing Ordinance once the Council had defeated an earlier resolution of intention on June 28. Another argument is that once the vote of August 1 occurred, the Court should not have adjudicated the council members in contempt. Underlying both arguments is the contention that a less confrontational resolution of the matter could have been achieved had the District Court selected the alternatives of either appointing a commission to exercise the Council's housing and related powers or ordering the Affordable Housing Ordinance into effect.

These arguments blend two somewhat different propositions of law, but in the end, both are unavailing. In challenging the District Court's decision to require the Council to enact the Affordable Housing Ordinance, the contemnors are alleging an abuse of discretion in the Court's choice of remedies for the constitutional violations adjudicated in 1986. As the contemnors point out, a District Court, though endowed with broad discretion in fashioning remedies for constitutional violations, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), must exercise restraint in determining what actions ought to be required of state and local governmental officials. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2462 (1987); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). In challenging the District Court's decision to impose coercive contempt sanctions, the contemnors are alleging an

abuse of discretion in the Court's method of enforcing the remedy that had been selected. Though there is no question that courts have authority to enforce their lawful orders through civil contempt, *Shillitani v. United States*, 384 U.S. 364, 370 (1966), the contemnors properly point out that in selecting contempt sanctions, a court is obliged to use the " 'least possible power adequate to the end proposed.' " *Id.* at 371 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)).

In this case, however, there is a fundamental reason why the choice of implementing legislation as a remedy and the choice of coercive contempt sanctions to enforce compliance with that remedy cannot possibly be an abuse of the District Court's discretion. That reason is the blunt fact that the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation, specifically including tax abatements and zoning changes. By its approval of the Consent Judgment the City Council itself selected the remedy of implementing legislation and cannot complain that the District Court approved the agreement. Moreover, once committed by its own agreement to adopting implementing legislation, the Council cannot complain that its obligation is enforced by the coercive sanctions of civil contempt. Consent judgments are important devices for resolving difficult controversies. Their effectiveness depends on the ability of all concerned to rely on the enforcement of their terms. In the context of a consent judgment, use of civil contempt sanctions is the "least possible power *adequate* to the end proposed" because faithful performance of the agreement is precisely the end proposed.

To the extent that the council members are contending that the District Court exceeded its discretion in ordering

them to adopt the precise terms of the Affordable Housing Ordinance, this argument also is unavailing. The Consent Judgment had obliged the City not only to enact implementing legislation but to furnish within three weeks a long-term plan spelling out the details on matters left unresolved in the consent judgment. Upon the City's default of that obligation, the District Court was fully entitled to proceed with efforts to formulate a long-term plan. The Court proceeded cautiously, according the City a full opportunity to draft the plan and ultimately accepting nearly everything that the City proposed. Similarly, with the specifics of the Affordable Housing Ordinance, the District Court afforded the City the opportunity to have its consultants draft the ordinance and accepted the draft they produced. By ordering passage of the Affordable Housing Ordinance, the District Court was carrying out the terms of the Consent Judgment under which the City agreed to adopt implementing legislation on tax abatements and zoning changes and doing so with details supplied by the City itself. The order of July 26 was well within the discretion of the District Court, as was its decision to enforce that order by civil contempt sanctions.

3. State Law Objection

Council member Chema contends that the order of July 26 cannot be enforced by contempt sanctions because it violates state law requiring notice and hearing of proposed changes in zoning ordinances. N.Y. Gen. City Law § 83 (McKinney 1968). The argument is unavailing. In the first place, the supremacy of federal law, including federal court orders to implement remedies for federal constitutional and statutory violations, prevails over conflicting state laws. *See Cooper v. Aaron*, 358 U.S. 1 (1958). Moreover, the District Court made clear in its letter to counsel

of July 28 that the order of July 26 would be satisfied if the Council "adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This alternative means of compliance with the July 26 order was reiterated in the August 2 hearing at which the council members were adjudicated in contempt.

It may be contended that by requiring a resolution of intention by August 1, prior to the August 15 hearing on the Ordinance, the District court was observing the notice requirement of state law but overriding the substance of the hearing requirement by ordering the Council to commit itself to an Ordinance before it had the benefit of input from the public. We do not understand the District Court to have simultaneously permitted time for the public hearing and also precluded consideration of its results. Obviously, the basic issue of adopting an ordinance that implemented the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order had been determined and would not be open for reconsideration as a result of the public hearing. To that extent, the state law hearing requirement was properly overridden by paramount federal law. But there is no reason to believe that the District Court intended to bar consideration by the Council of useful suggestions tendered at the public hearing that might improve specific provisions of the Affordable Housing Ordinance. The hearing would still be useful to the extent that it generated suggestions not inconsistent with achieving the basic objectives of the remedial orders that had been entered. The Council has at all times been free to seek modification of the terms of the proposed ordinance, which the City's consultants drafted, but no such request has been made. Finally, we note that after the public hearing was held on August 15, the four individual

contemnors again voted against the Affordable Housing Ordinance.

4. Legislative Immunity

The major defense asserted by the council members is that they are entitled to legislative immunity and that such immunity prohibits a district court from compelling them to vote in favor of a particular ordinance. There is no doubt that state legislators enjoy immunity when engaged "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-23 (1980). The Supreme Court has extended such immunity to "regional legislators," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), but has expressly left open the question whether such immunity extends to "individuals performing legislative functions at the purely local level," *id.* at 404 n.26. Prior to *Lake Country Estates*, a number of circuits had denied immunity to local legislative officials, *see Williams v. Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977) (school board members); *Jones v. Diamond*, 519 F.2d 1090, 1101 (5th Cir. 1975) (county supervisors); *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir.) (aldermen), *cert. denied*, 409 U.S. 1042 (1972); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 231 (7th Cir. 1961) (village board of trustees); *Cobb v. City of Malden*, 202 F.2d 701, 706-07 (1st Cir. 1953) (Magruder, C.J., concurring) (city councilmen), but after the Supreme Court extended immunity to regional legislators, seven circuits ruled that similar immunity is available to local legislators, *see Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*,

690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. Unit A 1981), *cert. denied*, 445 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980).

Even if we assume for purposes of this appeal that city council members enjoy the same immunity available to state legislators, we would seriously doubt that such immunity insulates them from district court orders requiring them to comply with remedial decrees redressing constitutional violations. The Supreme Court has instructed a district court that, if necessary to secure compliance with a prior federal court remedial decree, it could order county legislators "to exercise the power that is theirs to levy taxes" to reopen the public schools of Prince Edward County, Virginia. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964). Though appellants minimize the force of this instruction by calling it dictum, since the need to issue such an order had not then arisen, it is especially forceful dictum when the Supreme Court specifically informs a district court what action it may take in the course of significant litigation. If it had become necessary to order the county legislators to levy taxes, there can be no doubt that the Supreme Court expected the district court to make sure that its order was enforced.

The Supreme Court has also upheld a district court's remedial order that required state and local officials to provide necessary public funds to implement a school desegregation plan. *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken* the Court expressly rejected an immunity defense based on Eleventh Amendment sovereign

immunity—a claim at least as substantial as the immunity defense now asserted by the four council members. The Court pointed out that though a state enjoyed immunity from damage actions, its immunity did not insulate it from a district court judgment requiring prospective action to comply with constitutional requirements, even when compliance would have "a direct and substantial impact on the state treasury." *Id.* at 289. *See also Edelman v. Jordan*, 415 U.S. 651 (1974). This Court has also approved an order of a district court compelling a city's legislative body to vote in favor of funds required to secure compliance with court-ordered remedies for constitutional violations. *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). *See also United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981) (requiring enactment of city ordinance), *cert. denied*, 456 U.S. 926 (1982).

Indeed, in one of the cases cited to us in support of legislative immunity, *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), we expressly distinguished litigation in which a state legislature had been enjoined "from continuing its defiance of federal court desegregation orders." *Id.* at 10 (citing *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.) (three-judge court), *aff'd sub nom. Denny v. Bush*, 367 U.S. 908 (1961)). The three-judge court in *Bush* had rejected the defense of legislative immunity on the ground that the Louisiana legislature was acting in an administrative capacity, *see Bush v. Orleans Parish School Board*, 188 F. Supp. 916, 922 (E.D. La. 1960) (three-judge court), *aff'd*, 365 U.S. 569 (1961), but our discussion of the *Bush* litigation in *Star Distributors* makes it clear that we did not consider legislative immunity to be a defense to orders issued "to vindicate the authority of a federal court." 613 F.2d at 10.

On this appeal, however, we need not definitively decide whether as a general matter a district court may order city council members to vote in favor of a particular ordinance, even to implement remedies for constitutional violations. This appeal presents the more narrow issue whether such an order may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's legislative body has voted in favor of such a consent decree. On that narrow issue, we have no doubt that federal court authority must prevail. No litigant, least of all public officials sworn to uphold the Constitution of the United States, may be permitted to avoid compliance with solemn commitments they have made in a consent judgment entered by a federal district court to remedy constitutional violations. Without intending to cast doubt on a district court's authority to order legislative action in contested litigation concerning the appropriate choice of remedies for constitutional violations, we note that the Supreme Court has recently observed that consent judgments may contain enforceable obligations that might have been beyond the authority of a district court to enter in contested litigation. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Nor is there any merit in appellant Spallone's suggestion that he may not be required to implement the Consent Judgment because he voted against its approval as a member of the City Council. A federal court must be able to rely upon the assurances given by municipalities and their legislative bodies, without regard to the dissenting votes of individual local officials. Once the Yonkers City Council approved the terms of the Consent Judgment, the Council became obligated to carrying out its commitments. If a

member of the Council is unwilling to abide by such commitments, his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them.

Whatever the scope of local legislators' immunity, it does not insulate them from compliance with a consent judgment to which their city has agreed and which has been approved by their legislative body.

5. First Amendment

The council members' assertion of a First Amendment defense to the July 26 order and its enforcement requires no extended discussion. Even if we acknowledge that the act of voting has sufficient expressive content to be accorded some First Amendment protection as symbolic speech, the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred. *See United States v. O'Brien*, 391 U.S. 367 (1968). The council members remain free to express their views on all aspects of housing in Yonkers. But just as the First Amendment would not permit them to incite violation of federal law, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Dennis v. United States*, 341 U.S. 494 (1951), it does not permit them to take action in violation of such law.

B. The City

To the extent that the City advances the same objections as the council members, particularly the contention that the District Court should have chosen to adopt the Affor-

dable Housing Ordinance itself or to appoint a commission to exercise the City's housing functions, we need not repeat our reasons for rejecting those objections. Three contentions, however, require further discussion.

1. Defense of Impossibility

The claim most vigorously pressed by the City is the defense of impossibility. The City contends that enactment of the Affordable Housing Ordinance requires an affirmative vote of a majority of the City Council and that the City, as a corporate entity, is powerless to compel the council members to act. We recognize that civil contempt sanctions may not be imposed upon a person or entity unable to comply with a court's orders. *See Shillitani v. United States, supra*, 384 U.S. at 371; *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). Nevertheless, we conclude that the City's defense of impossibility is unavailing.

Preliminarily, we have some doubt whether the City has done everything it can, apart from securing the favorable votes of a Council majority, to obtain compliance with the orders of the District Court. The City has not requested the Governor of New York to use whatever authority he may have to remove local officials for misconduct, nor has the City requested the New York Emergency Financial Control Board for the City of Yonkers to take whatever action its broad authorizing statute permits it to take under the current circumstances, 1984 N.Y. Laws ch. 103.

More fundamentally, we agree with the position urged by the United States that the City cannot view itself as an entity separate from the City Council for purposes of complying with the Consent Judgment. The City bound itself to take necessary legislative action when it agreed to the Consent Judgment, which explicitly calls for implement-

ing legislation. Having made that commitment, the City may properly be subjected to the coercive force of civil contempt sanctions until compliance with its commitment occurs. The suggestion that the administrative officials of the City are willing to comply but cannot take legislative action conjures up a scheme of separated powers that does not obtain in Yonkers. For purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa. The Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("where action is directed by those who establish governmental policy, the municipality is equally responsible" with city's authorized decisionmakers), it appoints and can replace the city manager, and it is the principal agency of governance for the City. There is not even a separately elected executive authority. The mayor is a council member elected to the Council in a citywide election; the other council members are elected from districts. Under the circumstances of this case, the Council's defiance of the Consent Judgment and the implementing orders of the District Court is the defiance of the City, and the City, along with the defiant council members, may be subject to civil contempt sanctions. As the Supreme Court has observed, "If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." *Hutto v. Finney*, 437 U.S. 678, 691 (1978). The same may be said of a city.

The City further contends that even if it can legally be held in civil contempt because of the violation of the July 26 order, it was an abuse of discretion to do so under the circumstances here presented, especially since the District Court had available the alternative of ordering the Affordable Housing Ordinance into effect. We conclude, however, that the District Court neither erred as a matter of

law nor exceeded its permissible discretion by using contempt sanctions to coerce the City to fulfill commitments that it had undertaken in the Consent Judgment or by determining that such sanctions were necessary to achieve enactment of the Ordinance.

2. State Law Objection

The City asserts a state law objection different from the council members' claim concerning notice and hearing requirements for zoning changes. The City contends that it lacks the authority under state law to grant the tax abatements required by the Long Term Plan Order. It acknowledges some authority to grant tax abatements, *see* N.Y. Real Prop. Tax Law § 421-c (McKinney 1984), but contends that the Long Term Plan Order requires tax abatements permissible only for cities of more than one million population, *id.* § 421-a(2)(a).

We cannot be certain whether the District Court, in issuing the Long Term Plan Order, intended to override state law in the belief that the specified tax abatements were necessary to remedy the violations that have occurred or intended to require only those tax abatements consistent with state law. The Court clearly had the power to override state law to implement its judgment, but we are not certain that it intended to use such power. We need not resolve the uncertainty at this time, however, because the City's challenge is to the provisions of the Long Term Plan Order, not the Affordable Housing Ordinance, which is the subject of the pending contempt adjudication. The Ordinance refers to tax abatements but does not implement them. *See* proposed Affordable Housing Ordinance § 2(a) n.*. Under the circumstances, we will not disturb the contempt adjudication but will grant leave to the City to seek clarification from the District Court whether it

intends to order tax abatements that override state law or only such abatements as are consistent with state law.

3. The Amount of the Monetary Sanctions

The City contends that the amount of the coercive fines imposed as a remedial sanction for civil contempt is excessive and a violation of the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The fines start at $100 a day and double each day of continued noncompliance. As a result of doubling, the fine exceeds $100,000 for day 15, exceeds $1 million for day 21, and exceeds $1 billion for day 25.

The Supreme Court has stated that the Eighth Amendment is "designed to protect those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). More recently the Court has raised the possibility that the Amendment might have some application beyond the criminal context; the Court characterized as a "cognizable constitutional challenge" a claim that the Excessive Fines Clause applies to the amount of punitive damages that may be awarded in civil cases, *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988), but declined to decide the issue because it had not been preserved for review as a federal question, *id.*

Even if the Excessive Fines Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders. We have already held that the Cruel and Unusual Punishments Clause does not apply to coercive imprisonment imposed as a civil contempt sanction, *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979), and the reasoning of *Dien* applies to the Excessive Fines Clause. Both clauses apply to sanctions imposed to punish

past conduct, not to sanctions imposed to secure prospective compliance.

The inapplicability of the Excessive Fines Clause, however, does not mean that civil contempt sanctions are subject to no limitation. The Due Process Clause is an arguable limitation, though it is debatable whether a person has been "deprived" of property within the meaning of the Fifth Amendment when that person always has the option of complying with the order of the court and thereby terminating the obligation to pay the coercive fine. In any event, the law of contempt itself exerts some outer limits on the normally "wide discretion" of a district court to fashion appropriate remedies to secure compliance with its lawful orders. *See Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). *See also Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.) (level of corporate profits relevant in determining whether coercive fine is "confiscatory"), *cert. denied*, 459 U.S. 832 (1982).

The fact that a coercive monetary sanction requires payment of a large daily fine does not necessarily render that sanction beyond the discretion of a district court. The Supreme Court has itself selected as an appropriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days. *United States v. United Mine Workers*, 330 U.S. 258, 305 (1947). We have declined to disturb by mandamus the imposition of a coercive fine that started and remained constant at the level of $150,000 per day. *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

The City of Yonkers has an annual budget of $337 million. The need for a substantial daily fine to coerce compliance is demonstrated by the City's announcement to the District Court of its willingness to pay $30 million to be relieved of its commitment to build the 200 units of public housing. Obviously, the City believes that there is a price it is willing to pay to avoid compliance with the orders of the District Court. The District Court was entitled to establish a schedule of fines that would secure compliance with its orders, and under the circumstances of this case that schedule would have to reach, without undue delay, a cumulative fine significantly above the price the City was willing to pay for noncompliance. The Court acted well within its discretion in starting the fine schedule at $100 a day. The Court also was entitled within reasonable limits to double the amount of the fine for each day of continued defiance. At that rate the cumulative fine after seven days, when we issued our stay, was $12,700. At some point, however, the doubling reaches unreasonable proportions. Under the current schedule the fine for day 25 is more than $1 billion; the fine for day 30 is more than $50 billion.

We believe that the doubling exceeds the bounds of the District Court's discretion when the level of each day's fine exceeds $1 million. The present schedule calls for a fine of more than $800,000 on day 14. We will therefore modify the contempt sanction against the City to provide that the fine shall be $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance.

Conclusion

We affirm the contempt sanctions against the four council members, Spallone, Chema, Longo, and Fagan.

We modify the contempt sanction against the City of Yonkers so that the fine is $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance, and we affirm the sanctions against the City, as modified. We deny the pending motion to stay the District Court's order of July 26. We direct that issuance of our mandate be stayed for seven days from the date of this decision to permit application to the Supreme Court or a Justice thereof for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. Unless a stay is granted by the Supreme Court or a Justice thereof, our mandate shall issue seven days from the date of this decision and our prior stay of the contempt sanctions shall at that time be vacated. On the date our mandate issues, the fines against each of the four council members shall resume at the level of $500 per day and, if noncompliance continues, each shall be imprisoned, pursuant to paragraph 5 of the Order of July 26, two days after the date our mandate issues. Since our stay entered on August 9 and the District Court's Order directed imprisonment to occur on August 11, it is appropriate to adjust the incarceration timetable in light of the interval between the issuance of our stay and the vacation of that stay upon issuance of our mandate. Also on the date our mandate issues, the fines against the City shall resume at the level for day 8 of the schedule resulting from the District Court's Order of July 26 and, if noncompliance continues, shall double until day 14, shall be $1 million on day 15, and shall be $1 million per day for every subsequent day of noncompliance.

Affirmed as to the council members; affirmed, as modified, as to the City.

EXHIBIT F—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 3, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES, *et al.*,

Plaintiffs,

against

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

RULE

On August 2, 1988, this Court entered an order adjudging Peter Chema in civil contempt for the reasons stated therein.

In addition, it is hereby ordered that the application of Peter Chema for a stay of the order of contempt and the imposition of sanctions is hereby denied.

SO ORDERED:

Dated: New York, New York
August 3, 1988

LEONARD B. SAND
United States District Judge
8/4/88

(Stamped):
U. S. District Court
Filed Aug. 4, 1988
S. D. of N. Y.

EXHIBIT G—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 2, 1988, Adjudicating City of Yonkers in Civil Contempt.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Interveners,

v.

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 Civ. 6761 (LBS)

ORDER ADJUDICATING CITY OF YONKERS IN CIVIL CONTEMPT

ORDER

SAND, J.

On July 26, 1988, this Court entered an Order requiring the City of Yonkers pass on or before August 1, 1988, the legislative package relating to the long term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988, and the Long-Term Plan dated June 13,

1988 ("Affordable Housing Ordinance"). Following entry of that Order, counsel for the City raised a number of questions as to the applicability of state law requirements relating to amendments to the City zoning ordinance. Rather than deal with any question of federal predemption, this Court notified counsel for the City and the Plaintiffs by letter dated July 28, 1988, that compliance with its July 26th Order could be met by adoption by the City Council of a resolution committing the City to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

The July 26th Order further provided that upon the City's failure to enact the legislative package as required, the City and its individual city council members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th Order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1st, the City Council, by a vote 4-3, refused to adopt the required resolution. Members of the city council voting against the resolution were identified as Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan and Peter Chema. At the hearing, the City was given ample opportunity to show cause why it should not be held in civil contempt of this Court's July 26, 1988 Order. Having considered the arguments of all parties, this Court finds as follows as to the City of Yonkers:

1. The City received adequate notice as to its duty under the July 26th Order;

2. At the hearing on August 2, 1988, the City had adequate opportunity to be heard; and

3. The City had the ability to comply and a full understanding of the consequences of non-compliance.

Accordingly, the City of Yonkers is adjudged in civil contempt of this Court's July 26, 1988 Order. The Court notes that this action is but the latest in a series of contempts of this

Court's prior Orders. However, this contempt is the most immediate and clearly drawn.

In so finding, this Court rejects that City's contention that a dichotomy can be drawn between the City and its council members through which it acts.

Therefore, it is hereby ORDERED that:

1. Until such time that the City has purged itself of contempt by enacting the Affordable Housing Ordinance or a resolution of intent to adopt the same, the City shall be subject to daily fines as set forth in Paragraph 3 of the July 26, 1988 Order. The first check is due and payable by 4:30 p.m. on August 3, 1988.

2. If at some later point, the City purges itself of contempt and then resumes its contumacious conduct, the level of fines to be imposed for such renewed contumacy shall begin at the level at which the fines had previously ceased; and

3. The City may apply in this Court at any time for relief from this Order based upon a showing of changed circumstances warranting such relief.

It is further ORDERED that the City's application for a stay of this Order is DENIED.

SO ORDERED

DATED: August 2, 1988
New York, New York

LEONARD B. SAND
United States District Judge

(Stamped):
Illegible

EXHIBIT H—Decision of United States Supreme Court Dated September 1, 1988, on Application for a Stay.

SUPREME COURT OF THE UNITED STATES

Nos. A-172, A-173, A-174, AND A-175

HENRY G. SPALLONE
A-172 v.
UNITED STATES ET AL.

NICHOLAS LONGO AND EDWARD FAGAN
A-173 v.
UNITED STATES ET AL.

PETER CHEMA
A-174 v.
UNITED STATES ET AL.

CITY OF YONKERS
A-175 v.
UNITED STATES ET AL.

ON APPLICATIONS FOR STAY

[September 1, 1988]

The applications for stay of Henry G. Spallone, Nicholas Longo, Edward Fagan, and Peter Chema presented to JUSTICE MARSHALL and by him referred to the Court are granted pending the timely filing and disposition by this Court of petitions for writs of certiorari.

The application for stay of the City of Yonkers presented to JUSTICE MARSHALL and by him referred to the Court is denied.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, concurring in the denial of stay in A-175, dissenting from the grant of stay in A-172, A-173, and A-174.

On August 26, 1988, the Court of Appeals for the Second Circuit upheld both the District Court's determination that

were in contempt of court and its imposition of sanctions for their failure to abide by a consent decree committing the City to implement a housing desegregation plan. The Court of Appeals stayed issuance of its mandate until September 2, to permit application for a stay of the contempt sanctions pending filing and consideration of petitions for writs of certiorari. The City of Yonkers and the four councilmembers have sought such a stay. Today the Court denies a stay as to the City but grants it as to the four councilmembers. I believe that the Court should deny the stay as to the councilmembers as well.

I

In 1980, the United States filed suit against the City of Yonkers, claiming it had intentionally perpetuated and aggravated residential racial segregation in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U. S. C. §§3601–3619 (1982), and had intentionally segregated its schools in violation of the Constitution. The National Association for the Advancement of Colored People (NAACP) was accorded plaintiff-intervenor status. In 1985, the District Court held the City liable for intentional housing and school segregation, *United States* v. *Yonkers Board of Education*, 624 F. Supp. 1276 (S. D. N. Y. 1985), finding *inter alia* that the City had deliberately concentrated virtually all of its public and subsidized housing in southwest Yonkers in order to maintain residential segregation. The District Court issued a Housing Remedy Order which directed the City to establish a fair housing policy, to construct 200 units of public housing and to plan additional units of subsidized housing. The Court of Appeals for the Second Circuit affirmed both the liability and remedy rulings, *United States* v. *Yonkers Board of Education*, 837 F. 2d 1181 (2d Cir. 1987), and the Court denied the City's petition for a writ of certiorari. 108 S. Ct. 2821 (1988).

On November 15, 1988, the City informed the District Court that it would not comply with the Housing Remedy

Order. The United States and the NAACP moved for an adjudication of civil contempt and the imposition of coercive sanctions, but the District Court instead sought voluntary compliance with its earlier order. After negotiations, the City Council—the City's sole governing authority—agreed to appoint an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for subsidized housing. Over a year passed. On January 28, 1988, the parties entered into a consent decree, approved by the District Court, which set a new timetable for the construction of the 200 public housing units. The City pledged that it would not seek further review of the Housing Remedy Order or any subsequently entered decree relating to these 200 units. In addition, the City agreed that the construction of 800 units of subsidized housing was an appropriate remedy and pledged to make good-faith efforts to build the additional 600 units within the next three years. Section 17 of the consent decree obligated the City "to adopt . . . legislation" necessary to meet the goal of 800 units, including tax abatements, zoning changes, and, within ninety days, a package of incentives for local development. Section 18 provided for further negotiations and the submission of a draft of a second consent decree setting forth long-range plans for subsidized housing by February 15, 1988. The Council approved the consent decree by a vote of 5 to 2.

Within two months, the City demonstrated its unwillingness to comply with the consent decree by moving unsuccessfully to delete the provision in which it promised not to seek further review of its obligation to build the 200 units, and by offering to return approximately $30 million in federal funds in the event this Court set aside the public housing provisions of the Housing Remedy Order. On April 12, 1988, the City announced that it was "not interested" in completing negotiations on the long-term plan for subsidized housing as required by section 18 of the consent decree. Following a hearing on June 13, the District Court entered a Long Term Plan Order

outlining the legislation that the City had committed itself to adopt in section 17 of the consent decree. The order was based on a draft prepared by the City's lawyers during earlier negotiations and accommodated most of the City's objections.

The next day, June 14, 1988, the Council adopted a resolution declaring a moratorium on all public housing construction in Yonkers. A week later, on June 21, the City announced that it had retained a consulting firm to draft housing legislation, and that the next Council meeting was tentatively scheduled for August. The District Court, expressing concern about delay, asked the Council to pass a resolution adopting the provisions of the Long Term Plan Order. On June 28, the Council voted down a resolution indicating its commitment to implementing the Housing Remedy Order, the consent decree, and the Long Term Plan Order. The following day, the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable on penalty of a contempt adjudication and imposition of fines. At a hearing held to consider the proposed order, the City stated that it would not voluntarily comply with the Long Term Plan Order and urged the Court to enter an order adopting the necessary legislation. The City also objected to the creation of an Affordable Housing Commission to exercise the Council's responsibilities for implementing the District Court's orders and the consent decree. The City argued that such a Commission would impermissibly interfere with the Council's "core legislative and executive functions."

On July 26, 1988, the District Court ordered the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [consent decree] and the Long Term Plan Order." This "legislative package" was set forth in a detailed Affordable Housing Ordinance drafted by the City's consultants. The July 26 order warned that if the legislation were not adopted by August 1,

the City and the councilmembers would face contempt adjudication and the following fines: on the City, a fine starting at $100 on August 1 and doubling every day until the legislation was passed, so that the cumulative total of the fines would exceed $10,000 by day 7, $1 million by day 14, $200 million by day 21 and $26 billion by day 28; on the councilmembers, a fine of $500 per day on each member who voted against the legislative package, with the additional threat of incarceration on August 10 if the package were not adopted by the Council by that time. To accommodate the City's expressed concern that it could not adopt legislation by August 1 without running afoul of state notice and hearing requirements, the District Court specified that its July 26 order would be "satisfied if the City Council, on or before August 1, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." On August 1, the Council rejected such a resolution by a vote of four to three.

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and councilmembers an opportunity to show cause why they should not be adjudicated in civil contempt. As for the City, the District Court "rejected [its] contention that a dichotomy can be drawn between the City and the council through which it acts." Further, the District Court declined to adopt the Affordable Housing Ordinance for the City, as requested by the City, noting that the City should directly meet its responsibilities under the Constitution and the consent decree. As for the four councilmembers who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, the District Court rejected their request for a continuance, observing that they had been on notice since July 26 of the prospect of contempt and the need for counsel, and that they had rejected the court's offer of an immediate evidentiary hearing. The District Court agreed nonetheless that it would permit argument at a later date on any theory or cir-

cumstance not then available to counsel. The District Court held the City and the councilmembers in contempt and imposed the sanctions set forth in the July 26 order.

On August 9, the Court of Appeals stayed the District Court's contempt sanctions against the City and the four councilmembers pending appeal. On August 26, the Court of Appeals, in a unanimous opinion by Judge Newman, affirmed the District Court's contempt orders and the imposition of coercive monetary sanctions, with one modification in the City's sanctions. First addressing the claims of the councilmembers, the Court of Appeals found that the procedural due process requirements attendant to the contempt adjudications were, with one exception, fully observed. The July 26 order provided sufficient notice to councilmembers of the consequences of noncompliance. Each member appeared with counsel and had an opportunity to present evidence and legal argument. Although the Court of Appeals found that it would have been preferable to have accorded counsel a few days to prepare, it declined to remand the matter given the absence of factual disputes and its decision on the merits. The Court of Appeals also rejected the councilmembers' First Amendment argument, stating that the public interest in obtaining compliance with federal court judgments that remedy constitutional violations justifies whatever burden there may have been on the councilmembers' free expression rights.

As for the argument that the councilmembers were entitled to some form of legislative immunity, the Court of Appeals noted that, even if such immunity extends to individuals performing legislative functions at the purely local level, it would not bar District Court court orders requiring compliance with decrees redressing constitutional violations. The Court of Appeals stressed, however, that it was not necessary to answer the broad question whether a District Court could order local legislators to vote in favor of a particular ordinance to redress a constitutional violation, because the

Council had approved, and the City had signed, a consent decree requiring the enactment of legislation necessary to implement the District Court's earlier order. The Court of Appeals found that all councilmembers, including those who had voted against the consent decree, were obligated to enforce it, and that their failure to do so made appropriate contempt adjudications and the imposition of sanctions.

Along these same lines, the Court of Appeals also decided that the District Court did not abuse its discretion in directing the Council to adopt the Affordable Housing Ordinance, and in imposing coercive contempt sanctions to compel compliance, given that the City had agreed in the consent decree to adopt necessary implementing legislation. As for the claim that the July 26 order compelled the Council to violate state notice and hearing requirements, the Court of Appeals stressed the supremacy of federal court orders in implementing remedies for constitutional violations. The Court of Appeals added that, in any event, the Council could have satisfied the July 26 order by passing a resolution committing itself to enact the legislation in accordance with state law procedures. As for the City's claims, the Court of Appeals rejected the defense of impossibility, noting that the City had not done everything it could under city law to obtain compliance with the orders of the District Court. In particular, the City had not tried to coerce council members into compliance by applying to the Emergency Financial Control Board to take action with respect to the City's financial affairs, or by requesting the Governor of New York to remove the recalcitrant councilmembers for misconduct. In any event, the Court of Appeals concluded, "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." The Court of Appeals noted in this regard that the City has no separate executive authority in that its mayor merely serves on the Council, and that the city manager serves at the pleasure of the Council.

Finally, as to the amount of the coercive fines, the Court of Appeals found that the Excessive Fines Clause of the Eighth Amendment does not apply to civil contempt sanctions imposed to obtain compliance with court orders. Although the court noted that the Due Process Clause of the Fifth Amendment arguably provides a limit, it relied on an abuse of discretion standard to review the amount of the fines. The Court of Appeals held that the District Court acted within its discretion in imposing cumulative fines and in starting the fine schedule at $100 a day, but it modified the schedule so that the fine would be $1 million on day 15 and $1 million for every subsequent day of noncompliance. Given the City's annual budget of $887 million, the Court of Appeals found that a $1 million a day fine was within "reasonable limits."

II

The City argues that the fines imposed by the District Court violate the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment; that the Court of Appeals erred in affirming the contempt adjudication because the District Court did not adopt less restrictive alternatives; that the City had a valid impossibility defense; and that the order violated state law. Councilmembers Spallone and Chema claim legislative immunity. Chema also argues that the contempt sanction violates the First Amendment and his procedural due process rights. Councilmembers Longo and Fagan claim generally that the sanction was an abuse of discretion and unconstitutional.

A. *The City*

The City's first contention is that the Excessive Fines Clause of the Eighth Amendment is applicable to contempt sanctions and that the particular sanctions imposed here were constitutionally excessive. The City accurately observes in this regard that the Court has indicated that the applicability of this Clause to punitive damages in civil cases is "a question of some moment and difficulty." *Bankers Life &*

Casualty Co. v. *Crenshaw*, 108 S. Ct. 1645, 1651 (1988). But, even if the Clause applies to punitive damages, the City offers no compelling reason why we should extend its reach to civil contempt sanctions. Indeed, it appears settled that the Cruel and Unusual Punishment Clause does not apply to civil contempt sanctions. *See Ingraham* v. *Wright*, 430 U. S. 651, 668 (1977). This is not surprising since the Cruel and Unusual Punishment Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees. *See ibid.*; *Upham* v. *Wyman*, 360 U. S. 72, 81 (1959). In any event, even assuming that the size of monetary contempt sanctions is limited by the Excessive Fines Clause or even the Due Process Clause, I do not think that the fines against the City, as modified by the Court of Appeals, are unreasonable. The City of Yonkers has an annual budget of $337 million. At one point, it offered to forfeit $30 million in federal funds to avoid compliance with the consent decree. Under these circumstances, a fine schedule which imposes $1 million a day only after noncompliance for fifteen consecutive days can hardly be deemed unreasonable.

The City's second contention is that the contempt adjudication itself was improper because the District Court should have adopted less restrictive alternatives such as direct enactment of the legislation or appointment of an Affordable Housing Commission, and because the City had a valid impossibility defense. Neither contention has merit. First, the District Court had no need to resort to its equitable authority, codified in Fed. R. Civ. P. 70, to deem the legislation enacted, as the City had committed itself to adopting that legislation in a court-approved consent order. Surely it is both less disruptive and more effective to order compliance with that order than to usurp completely the Council's legislative authority and enact the legislation directly. Second, having previously objected to the creation of an Affordable Housing Commission, the City cannot now claim that the Dis-

trict Court should have created such an entity. The City also contends the District Court erred by rejecting its impossibility defense. It claims that it does not have the ability to compel the councilmembers to enact the legislation or to remove recalcitrant members. The City's attempt to divorce itself from the actions of its councilmembers is disingenuous. As the City repeatedly points out in its application, "Yonkers is relatively unique in that most of the governmental power in the City is centralized in the legislative branch." For this reason, the City is the Council. Indeed, because the Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U. S. 469, 481 (1986), it is reasonable to attribute to the City the acts of its elected policymakers.

B. *The Councilmembers*

The councilmembers' primary argument is that a federal court lacks authority to order an individual local legislator, as opposed to the body in which he serves, to enact specific legislation. In the councilmembers' view, a federal court, by entering such an order, runs roughshod over what they see as the local legislator's right to be absolutely free from such restraints. While this issue arguably is of substantial interest, this case is not a proper vehicle for addressing it. In the first place, the broad question raised by the councilmembers is not presented by these facts. As the Court of Appeals stressed below, this is not a case where a federal court enjoined local legislators to vote in favor of a particular bill in order to remedy a constitutional violation. Far from that, this case presents the much more narrow question whether a federal court may order local officials to abide by an explicit obligation—here, a promise to enact legislation—contained in a consent decree that the officials voted to adopt and that the District Court agreed to accept. In short, this case is about a District Court's ability to enforce its consent decrees. In no way did the Court of Appeals even hint that federal courts possess the broad powers over local legislators that the

councilmembers claim that the Court of Appeals arrogated to itself and the District Court.

In any event, it is not at all clear that federal courts lack authority in all circumstances to enter orders affecting a local legislator's performance of his legislative duties. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), the Court held that a District Court could order local school authorities to implement certain programs designed to ameliorate the effects of prior segregation policies. As a practical matter, the import of the Court's decision was that the individual members of the local school authority were required to vote a certain way for specific remedial programs. This necessary effect of a remedial order is highlighted by the Court's earlier decision in *Griffin* v. *County School Board*, 377 U. S. 218 (1964). There, the Court noted that a District Court possessed authority to order county supervisors "to exercise the power that is theirs to levy taxes" in order to reopen public schools that had been closed in an attempt to avoid a prior desegregation order. As in this case, the individual local officials in *Griffin* openly flouted clear commands of a District Court.

Although cases like *Milliken* and *Griffin* may stand for the proposition that the District Courts may enjoin local legislators to take certain affirmative steps in order to remedy constitutional violations, the Court has never squarely addressed the question whether these local legislators are entitled to some form of legislative immunity. In *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404 n. 26 (1979), the Court specifically left open the question whether local legislators are entitled to any immunity. (Earlier, in *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), state legislators were afforded absolute immunity for activities within "the sphere of legitimate legislative activity"; *Lake Country* extended such immunity to "regional legislators.") Since *Lake Country* issued, seven Courts of Appeals have held that local legislators are entitled to abso-

lute legislative immunity. None of these cases, however, involved situations where the District Court sought to compel certain behavior to redress constitutional violations, let alone situations where the District Court merely sought to enforce a consent decree. Instead, the cases typically involved private-party damage actions against individual members of local governing boards. It would seem sensible to allow the lower courts to be the first to resolve the question whether legislative immunity protects local officials against the imposition of contempt sanctions for noncompliance with a consent decree imposing legislative obligations.

Even assuming that this question warrants the Court's immediate attention, the instant case contains a factual peculiarity that makes it unsuitable for review. The City stresses its "extraordinary" system of governance, in which the Council exercises both legislative *and* executive powers. This necessarily complicates any legislative immunity analysis, particularly if one believes that the Council exercised its *executive* prerogatives by not complying with the consent decree, and by not abiding by the July 26, 1988, order. Before the Court takes up the issue of local legislative immunity, it should wait for a case in which the legislative body is exercising *only* legislative powers.

Finally, the First Amendment and procedural due process claims strike me as totally meritless for the reasons articulated in the Court of Appeals' opinion. In any event, they involve the application of settled law to a particular set of facts.

III

In my view, the claims presented by the City and the four councilmembers do not merit review by the Court. I therefore vote to deny the applications for stay.

EXHIBIT 1—Order of Hon. Leonard B. Sand, U.S.D.J., Dated May 28, 1986.

UNITED STATES v. YONKERS BD. OF EDUC.

Cite as 635 F.Supp. 1577 (S.D.N.Y. 1986)

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court, S.D. New York.

May 28, 1986.

U.S. Dept. of Justice, Washington, D.C., Joshua P. Bogin, Kenneth Barnes, Michael L. Barrett, Sarah Vanderwicken, for plaintiff U.S. Civil Rights Div.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, New York City, Michael W. Sculnick, Gerald S. Hartman, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, Detroit, Mich., John B. Weaver, John H. Dudley, Mark T. Nelson, Hall, Dickler, Lawler, Kent & Howley, New York City, Paul Whitby, for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civil Div., Raymond M. Larizza, Calvin E. Davis, Kirk Victor, John W. Herold, Office of Litigation, U.S. Dept. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

HOUSING REMEDY ORDER

SAND, District Judge.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. *Fair Housing Resolution and Office*

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair hous-

ing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable.

The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

"1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

"2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs

should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

"3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers, local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made

aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

"4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

"5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there.

The affirmative marketing plans shall be consistent with the occupancy priorities provisions (¶ VII) of this Order.

"6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

"7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private non-profit agencies. The

FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof."

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. *Public Housing Units*

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The

Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984–85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984–85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98–45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City is hereby ordered to submit the required

documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984–85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984–85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984–85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-inter-

venors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall ad- the owner under which the owner (or developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by

vise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing

in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisi-

tion of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further

the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are cur-

rently available or which become available during the pendency of this Order.

IX. *Notice*

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. *Jurisdiction*

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an objection is made with sufficient particu-

larity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

EXHIBIT J—Opinion of Hon. Leonard B. Sand, U.S.D.J., Dated July 10, 1987.

U.S. v. YONKERS BD. OF EDUC.
Cite as 662 F.Supp. 1575 (S.D.N.Y. 1987)

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court,
S.D. New York.

July 10, 1987.

U.S. Dept. of Justice, Civil Rights Div., Washington, D.C., Sarah Vanderwicken, for plaintiff U.S.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, Michael W. Sculnick, New York City, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, John B. Weaver, John H. Dudley, Mark T. Nelson, Detroit, Mich., for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civ. Div., Raymond Larizza, Calvin E. Davis, Washington, D.C., John W. Herold, Office of Litigation, U.S. Dept. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

OPINION

SAND, District Judge.

By letter dated July 8, 1987, counsel for the City of Yonkers forwarded to the Court copies of three resolutions adopted by the City Council on July 7, 1987:

1) Resolution No. 139–1987 with respect to the adoption of a Housing Assistance Plan (Appendix A);

2) Resolution No. 140–1987 with respect to a request to the County of Westchester (Appendix B);

3) Resolution No. 141–1987 with respect to an "alternate plan" (Appendix C).

Resolutions Nos. 139 and 140 are said by the City to be in compliance with this Court's Order of July 1, 1987 (Appendix D). At a telephone conference among all the parties held at the City's request on July 9, 1987, counsel for the Department of Justice advised that the Department was not yet in a position to state whether or not Resolution No. 139 was adequate. The Court directed that counsel for the Department and HUD expeditiously review the matter and promptly advise the Court if there were any perceived inadequacies in that resolution.

Counsel for the City, at said conference, assured the Court and the parties that Resolution No. 140 (the request to the County) was a separate, completely independent resolution and was not subject to any conditions or qualifications set forth in Resolution No. 141. Nor was Resolution 140 superseded by Resolution No. 141. (See Transcript, July 9, 1987). Counsel for the City further assured the Court and the parties that the City intended to furnish to the County, together with its request, the amplifying data set forth in this Court's July 1st Order and that the City would furnish the Court and the parties with copies of such submission prior to transmission to the County. Here too, the parties are to advise the Court as soon as possible if they believe that there are any

inadequacies in this resolution's compliance with the July 1st Order.

Resolution No. 141 proposes an alternative plan and seeks to impose conditions upon the Court before the City would seek to obtain the necessary consents and waivers. The conditions include a 90-day stay; a limit of 100 on the amount of construction in addition to the first 200 units; a prohibition against mixing affordable and public housing. The resolution which proposes eight sites also contains a proviso that if any portion of the resolution is not complied with, the entire resolution is to be deemed null and void. The resolution recites that it is enacted pursuant to a request by a number of east side civic groups listed in the resolution.

As the Court advised the parties at its July 9th conference, the constructive participation by the Yonkers City Council and these and other civic groups in the formulation of a housing remedy is welcomed and is to be encouraged. Before the Court would enter any final order directing the construction of any housing, it would give due consideration to any proposals made on behalf of Yonkers including proposals involving alternate or additional sites and densities. However, before any such alternatives could be seriously considered, the Court would have to be assured that the

proposals were viable and met all relevant criteria. In this regard, the Court directed HUD to conduct a preliminary evaluation of the Andrus Field site, the only site listed in the resolution not previously inspected by HUD.

The Court urges Yonkers to proceed as expeditiously as possible to obtain the consents and waivers needed to demonstrate the feasibility of its alternative plan. If and when Yonkers comes before the Court and makes a showing that it has either obtained formal approvals for the sites or a persuasive showing that the requisite approvals have informally been given, the Court will give careful and sympathetic consideration to any such alternative plan. In the interim, the parties are, of course, to proceed pursuant to the timetable set forth in the July 1st Order.

Insofar as any request for a stay is concerned, if it should develop that construction is about to commence prior to any ruling by the Court of Appeals in the appeal now pending before that Court and any party shall move for a stay of such construction, the Court will also give such an application careful and sympathetic consideration in the light of the conditions then obtaining. It is not the intent of the Court to require that any wasteful or counterproductive action be taken. The Court further assures the parties that it will permit a

sufficient interval of time between any ruling of this Court with respect to a stay and the commencement of construction to enable any party dissatisfied with any aspect of this Court's ruling on such an application to seek appellate review of this Court's determination.

As was acknowledged at the July 9th conference, any determination as to the total number of units eventually to be constructed pursuant to the housing remedy order prior to the receipt of the Outside Housing Advisor's reports and the comments of all the parties would be premature. No such determination of the total number of units to be built or of any mix of public and affordable housing will be made, however, without a full hearing, at which the views of Yonkers will be carefully considered.

SO ORDERED.

APPENDIX A

BY VICE MAYOR OXMAN:

WHEREAS, pursuant to the Order of the Hon. Leonard Sand, United States District Judge, entered May 28, 1986 in the matter entitled "U.S.A. v. City of Yonkers etc." in part VIII thereof the City of Yonkers was required to prepare and approve appropriate Housing Assistance Plans in a timely manner; and

WHEREAS, pursuant to said Court Order the plaintiffs have previously submitted a Three Year Housing Assistance Plan dated June 19, 1986 with a period of applicability from October 1, 1985 to September 30, 1986; and

WHEREAS, on advice of Appellate Counsel and without prejudice to our rights on appeal,

BE IT RESOLVED that the City of Yonkers, in City Council convened, hereby adopts the attached Housing Assistance Plan for the fiscal year 1987 with a period of applicability from October 1, 1986 to September 30, 1987 for Grant No. B-85-MC-36-0112 as the Second Year of the Three Year HAP approved July 11, 1986 and the City Manager is directed to forward same to the U.S. Department of Housing and Urban Development, Community Development Block Grant Program, Entitlement Program.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 9 to 4, Minority Leader Longo, Councilmembers Palais, Spallone and Fagan voting "NAY."

COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM
ENTITLEMENT PROGRAM

HOUSING ASSISTANCE PLAN For FY '87

City of York

B-85-MC-16-0112

HUD APPROVAL

(Signature of Authorized Official) (Date)

10/1/86 to 9/30/87 | [X] Original [ ] Revision [ ] Amendment | INCREMENTAL YEAR OF SUBMISSION [ ] 1 [X] 2 [ ] 3

INCORPORATION OF HAP, PARTS I-III, BY REFERENCE Part I, II and III of the HAP approved 7/11/86
as appropriate by reference and are not contained in this (second) (third) year submission (Latest amendment date of the HAP, Parts I - III, if any)

PART IV - ANNUAL HOUSING ASSISTANCE GOALS

PROGRAM OR PROJECT (List HUD Assisted Rental Housing Programs first, then other Rental Programs and Owner Programs Separately) A	HUD B	UNITS TO BE ASSISTED: NUMBER OF UNITS C	UNITS TO BE ASSISTED: HOUSING TYPE D	LOWER INCOME HOUSEHOLDS TO BE ASSISTED: ELDERLY E	SMALL FAMILY F	LARGE FAMILY G	TOTAL H
Rental Rehabilitation Program	x	20	Rehab	2	12	6	20
Section 8 Existing (Renters)	x	25	Existing	8	14	3	25
Section 312 Rehabilitation Program (Renters)	x	15	Rehab	4	8	3	15
CDBG Rehabilitation Loan and Grant Program (Renters)		18	Rehab	5	10	3	18
CDBG Rehabilitation Program (Owner)		12	Rehab	2	5	1	8

APPENDIX B

BY MAYOR MARTINELLI AND VICE MAYOR OXMAN:

WHEREAS, on July 1, 1987 the Hon. Leonard B. Sand, United States District Judge, entered an Order requiring the City Council to adopt certain resolutions under threat of contempt of court which would result in devastating fines to the taxpayers of the City of Yonkers, and

WHEREAS, the adoption of this Resolution is in compliance with the Order of the Court and is without waiver to the City's right to appeal from the Order requiring the adoption of this Resolution;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yonkers that the City of Yonkers hereby requests that the County Board of Legislators of Westchester County issue a binding declaration that with respect to those specific sites designated by the Court-appointed outside Housing Advisor, Oscar Newman, pursuant to Paragraph 9 of the Court Order entered July 1, 1987, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of the Hon. Leonard B. Sand in the action entitled *United States of America and Yonkers Branch NAACP v. Yonkers Board of Education City of Yonkers, etc.* Docket No. 80 CIV 6761 and that we request that the

County take prompt action in responding to this request.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to forward a certified copy of this Resolution forthwith to the Clerk of the Board of Legislators of the County of Westchester.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX C

BY MAYOR MARTINELLI, VICE MAYOR OXMAN, COUNCILMEMBERS BURGESS, NUCKEL, MANGIERI, WASCISKO AND RESTIANO;

WHEREAS, the United States District Court, by the Hon. Leonard B. Sand, in Order entered July 1, 1987 has determined that the first 200 units of public housing shall be built on Walt Whitman Junior High school, Lincoln High school, School No. 4 and School No. 30, and

WHEREAS, the Court has required that the City adopt a resolution requesting the County of Westchester to waive its reverter interest in all County surplus property identified by Oscar Newman for the construction of any housing pursuant to this Court Order, and

WHEREAS, the City Council on April 15, 1987 adopted Resolution No. 69–1987 suggesting that the Court adopt an alternate housing plan which would reduce the density of public housing on the school sites and thereby reduce the impact of such housing on the surrounding neighborhoods with several conditions incorporated therein, and

WHEREAS, on or before July 6, 1987 a number of east side civic groups including Crestwood Civic Association, Armour Villa Taxpayers Association, East Yonkers Homeowners and Wildlife Association, Lawrence Park West Neighborhood and Homeowners Association, Mohegan Heights Homeowners Association, Sunnyside Park Community Association, Taxpayers of Northeast Yonkers, Beech Hill Civic Association, and Victory Heights Homeowners Association, adopted a resolution requesting that the City Council renew its attempts to pursue the alternative housing plan provided certain conditions are incorporated within that plan while the City pursues its appeal to the fullest extent, and

WHEREAS, it is imperative that the City Council protect the taxpayers of the City of Yonkers from potentially devastating fines as well as a finding of contempt and at the same time minimize the potentially devastating effect that wide spread housing developn.ent would have on the east side of Yonkers without waiving any of the City's

rights in pursuing its appeal of the Court's Orders in this case.

NOW, THEREFORE, BE IT RESOLVED, that the City Council in accordance with the Resolution adopted by the East Side Civic Associations listed above, request the Court to consider implementing an alternative housing plan pursuant to Resolution No. 69–1987 adopted on April 15, 1987 except as modified below.

BE IT FURTHER RESOLVED, that the City Council reserves all of its rights on its appeal in the matter entitled *United State of America v. City of Yonkers* and reaffirms its commitment to appeal the liability Order and the Housing Remedy Orders and all other Orders to date all the way to the Supreme Court of the United States, if necessary.

BE IT FURTHER RESOLVED, that the City Council requests that the Court modify its Order placing 200 units of public housing on only the four school sites and instead reduce the density of each site and to place no more than the following number of units on the following sites:

Walt Whitman Junior High school—38–41 units

School No. 4—38–41 units

Lincoln High school—38–41 units

School No. 30—8–10 units facing or adjacent to Nevada Place only

Kardash Park—30–36 units

Redmond Field—10–12 units
Andrus Field—16–18 units
Hillview Reservoir—10–12 units
all in a semi detached or town house style.

BE IT FURTHER RESOLVED, that the City Council requests that the Court grant to the City of Yonkers a stay of construction of any public housing units until 90 days following the date of the decision of the City's appeal to the Second Circuit Court of Appeals and that the Court not place any affordable or other housing on any site on which the Court directs public housing to be built and that not more than 200 additional units of affordable or other housing be provided pursuant to the Housing Remedy Order, with not more than 100 to be new construction.

BE IT FURTHER RESOLVED, that in the event the Court grants a stay as set forth above and limits the construction of housing as requested above, the City Council hereby requests the County of Westchester to waive any present or future interest including reverter rights in those residual parcels known as "N" (Redmond Field), and "X" (Kardash Park) for the municipal purpose of Court Ordered public housing and for no other purpose notwithstanding any other resolution adopted by the City Council; that the City Council requests that a small portion of Andrus Park be de-dedicated as parkland, if necessary, but only to the extent of small south-

erly portion of the park up to and including the first two tennis courts for the construction of Court Ordered public housing as set forth in this resolution; and that the City Council hereby requests from the City of New York and/or the City of New York Water Board the transfer of a certain small portion of the Hillview Reservoir property along Shipman Avenue for the construction of public housing as set forth above.

BE IT FURTHER RESOLVED, that the City Council hereby requests the Board of Education to declare as surplus those portions of the school property to be used for public housing pursuant to this resolution and Court Order and return same to the City.

BE IT FURTHER RESOLVED, that the City Council declares that no further housing pursuant to the Court Order would be constructed on school property.

BE IT FURTHER RESOLVED, that the City shall build additional tennis courts and other recreational facilities at School 30 and Walt Whitman to more than replace any loss of such facilities.

BE IT FURTHER RESOLVED, that in the event that any portion of any of this Resolution is not complied with the entire Resolution be deemed null and void and with no effect.

Adopted by the City Council at a stated meeting on July 7, 1987 as amended by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX D

ORDER

SAND, District Judge.

On May 28, 1986, this Court issued its Housing Remedy Order which required the City of Yonkers to take certain specific actions to cure the intentional racial segregation found in this Court's liability Opinion, 624 F.Supp. 1276 (S.D.N.Y.1985). The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action.

In this light and cognizant of its responsibility to insure implementation of the 1986 Housing Remedy Order, the Court, on the joint application of the United States Department of Justice and the Yonkers Branch-National Association for the Advancement of Colored People, hereby orders:

I. PUBLIC HOUSING

1. By July 3, 1987, the Outside Housing Advisor (hereinafter "OHA") shall submit to the Court and the parties his proposal, including unit distributions, for the 200 units of public housing reserved by HUD through its Consent Decree with the plaintiff-intervenors (as approved by this Court on March 19, 1984). In submitting this proposal, the OHA shall utilize the following sites: Whitman; School 4; Lincoln High School and School 30. The OHA shall also include in his proposal a statement of the unit distributions and other consequences which would result if only the Whitman and School 4 sites were utilized for the 200 units.

2. With respect to the School 30 and Lincoln High School sites, HUD shall forthwith provide funds if necessary to complete site surveys and preliminary analysis deemed necessary for its review.

3. By July 9, 1987, HUD shall report to the Court any and all steps necessary for resolution of the "historic preservation" review regarding School 4 and its timetable for their accomplishment. The Court has previously determined and now reaffirms that the black-top across from School 4 on Trenchard Street is considered part of the School 4 site for purposes of this Order.

4. By July 13, 1987, the parties shall submit to the Court comments concerning the OHA's proposal. If the Yonkers

School Board opposes the utilization of portions of the Lincoln High School and School 30 sites for these purposes and wishes an evidentiary hearing on this issue, it shall so advise the Court and such hearing will be held on July 15, 1987 at 10:00 A.M. and continue until concluded.

5. By July 13, 1987, HUD shall submit to the Court the final and approved RFPs, as proposed by the Municipal Housing Authority, for the Whitman and School 4 sites. By this date, HUD shall advise the Court whether these RFPs or either of them may be used for the Lincoln High School and School 30 sites and, if not, what changes it deems required for such use.

6. By July 27, 1987, HUD shall review the suitability of School 30 and Lincoln High School (such portion as the OHA designates) for the units of public housing proposed by the OHA and shall apprise the Court and the parties of any specific deficiencies these sites may possess for the intended uses. By the same date, HUD shall also inform the Court of any measures it believes should and may be taken to mitigate these deficiencies and thereby improve the sites for their intended uses.

7. By August 7, 1987, the parties shall submit to the Court any further written submissions deemed relevant to the development of the 200 units of public housing on the sites identified by the OHA. There-

after, the Court shall determine whether further proceedings should precede entry of a final Order.

II. LONG TERM HOUSING PLAN

8. The May 28, 1986 Housing Remedy Order required the City of Yonkers to submit a long term housing remedy plan by November 15, 1986. The City failed to do so. After the Department of Justice moved to hold the City in contempt of court for this failure, among other acts of noncompliance with the Remedy Order, and the plaintiff-intervenors moved for the appointment of a Housing Master to take required remedial activities, the Court permitted the City to nominate an Outside Housing Advisor. In light of the events which have transpired subsequent to this nomination, the Court directs that the OHA shall cease functioning as representative or designee of the City and shall act solely in the capacity of an advisor to the Court pursuant to the provisions of paragraph IV-F. of the Housing Remedy Order.

9. By July 7, 1987, to facilitate implementation of the long term housing remedy, the Court hereby directs that the OHA advise the Court and the parties of those sites formerly owned by the County of Westchester which the OHA believes may be suitable for housing to be built pursuant to the long term housing plan.

10. By July 15, 1987 the City of Yonkers shall request from the County of Westchester a binding declaration that, with respect to the sites designated pursuant to paragraph 9 hereof, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of this Court. The City shall request prompt action by the County. In making its request of the County, the City shall provide pertinent information showing (a) the uses, if any, to which the parcels in question have been put since 1961, (b) any current municipal plans (developed before March 1, 1987) for such parcels and (c) the uses to which comparable parcels have been put heretofore. By July 13, 1987, the City shall furnish to the Court and the parties a copy of its proposed request of the County, including the foregoing information.

11. By August 7, 1987, the OHA shall provide the Court and the parties with his proposal for a long term housing remedy plan.

12. This plan shall both identify sites (publicly and privately held) which the OHA deems potentially feasible for the provision of assisted housing, housing, other than new construction or rehabilitation on the identified sites and enumerate those contributions to the development of such housing which the City of Yonkers should be required to make. This plan shall

present alternatives assuming a final goal with respect to assisted units of 200, 400, 600 or 800.

13. By August 22, 1987, the parties shall submit comments concerning the long term housing remedy proposal. The Court shall then determine whether further proceedings are necessary before entry of a final remedial Order.

14. On or before July 9, 1987, the City shall adopt and submit to HUD (with copies to the Court and the parties) a Housing Assistance Plan (HAP) for its Year 13 Community Development Block Grant application (as required for the receipt of grants by the Housing and Community Development Act of 1974, as amended). The HAP shall be in good faith compliance with the relevant statutes and regulations and consistent with the City's well defined prior commitments, undertakings, and the terms of the Housing Remedy Order.

15. Should the OHA determine that technical studies, including surveys, soil borings, etc. are required for the development of the long term housing plan, he shall promptly and in writing request same from the City Manager. Within three (3) business days of any such request, the City Manager shall respond in writing indicating (a) that the City shall provide the requested support or (b) an explanation of why the City declines voluntarily to provide the re-

quested support, or some of it. The OHA shall promptly submit any such negative response to the Court, with copies to the parties, for resolution.

16. Failure to implement the actions required by this Order shall be cause for entry of a finding of contempt against the City of Yonkers and against those City officials who, it is determined, have intentionally frustrated this Order. The City of Yonkers is hereby placed on notice that if the City is found to be in contempt of this Order or any provision hereof, it is the intent of this Court, in addition to any other sanctions which may appear to the Court to be appropriate, to impose a fine for each day of non-compliance. It is further the present intent of this Court that said fine be at a daily rate pursuant to the following formula: (a) $100 for the first day of non-compliance after entry of a finding of contempt and notice; (b) the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court by 4:30 P.M. on each day that the Clerk's Office is open representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on

which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be earmarked, escrowed, or otherwise allocated for any special purpose of fund. The amount of funds previously paid shall not be refundable. The City of Yonkers is directed to furnish a copy of this Order forthwith to the Emergency Financial Control Board for the City of Yonkers.

17. The City is also hereby placed on notice that this Court shall take those actions, as specified herein or otherwise determined to be required, to implement the Housing Remedy Order, regardless of the City's continued non-compliance. As set forth in paragraph 16 hereof, non-compliance by the City of Yonkers may result in a finding of contempt and appropriate sanctions against the City and its officials. However, such non-compliance shall not thwart or frustrate implementation of the Housing Remedy Order and whenever feasible and appropriate the Court may, in its discretion, itself act or direct others to act with the same force and effect as if those actions had been taken by Yonkers itself.

18. Without prior written approval of this Court, the City of Yonkers shall issue no building permits with respect to any City-owned or controlled land or property.

Without prior written approval of this Court, the City of Yonkers shall not sell, transfer or otherwise encumber any City-owned or controlled property.

SO ORDERED.

EXHIBIT K—Opinion of United States Court of Appeals for the Second Circuit, Dated September 22, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1504, 1505—August Term, 1987

(Argued: July 20, 1988 Decided: September 22, 1988)

Docket Nos. 88-6140, -6146

YONKERS RACING CORPORATION and
ST. JOSEPH'S SEMINARY AND COLLEGE,

Petitioners-Appellants,

—v.—

CITY OF YONKERS,

Respondent-Appellee,

—and—

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, *et al.*,

Intervenors-Appellees.

Before:

ALTIMARI and MAHONEY, *Circuit Judges*,
and KORMAN, *District Judge*.*

* The Honorable Edward R. Korman, United States District Court for the Eastern District of New York, sitting by designation.

Appeals from an order denying petitioners-appellants' motions to remand to state court, following removal, Article 78 proceedings commenced in the Supreme Court of the State of New York, Westchester County and from an order denying and dismissing on the merits petitions for relief pursuant to Article 78, entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*).

Affirmed in part, vacated and remanded in part. Judge Mahoney dissents in a separate opinion.

ROBERT D. MEADE and MICHAEL J. TRAINOR, White Plains, New York (Bleakley & Schmidt, White Plains, New York, of counsel), *for Petitioners-Appellants*.

MICHAEL W. SCULNICK, New York, New York (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, New York; Paul W. Pickelle, Corporation Counsel, City of Yonkers, Yonkers, New York; Rex E. Lee, Carter G. Phillips, Mark D. Hopson, Gary I. Resnick, Sidley & Austin, Washington, D.C., of counsel), *for Respondent-Appellee*.

LINDA F. THOME, Attorney, United States Department of Justice, Washington, D.C. (Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn, Attorney, Department of Justice, Washington,

D.C., of counsel), *for Intervenor United States of America.*

MICHAEL H. SUSSMAN, Counsel, Yonkers Branch, NAACP, Yonkers, New York (Sussman & Sussman, Yonkers, New York, of counsel), *for Intervenors Yonkers Branch, NAACP, et al.*

ALTIMARI, *Circuit Judge*:

These two separate appeals, which we have consolidated for purposes of this opinion, follow from the housing remedy portions of a prior judgment, entered in the United States District Court for the Southern District of New York (Sand, *J.*), finding the City of Yonkers (the "City" or "Yonkers") liable for a pattern and practice over a span of forty years of deliberately concentrating federally subsidized low income housing in the southwest quadrant of Yonkers in order to maintain racial segregation, and ordering Yonkers, *inter alia*, to provide sites for 200 units of public housing in nonminority areas of the city. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), and Housing Remedy Order, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

This case concerns the consent decree ("Consent Decree") reached between the City of Yonkers, the United States and the Yonkers chapter of the National Association for the Advancement of Colored People (NAACP) designating 7 public housing sites for 200 units of housing east of the Saw Mill River Parkway. Two of these sites currently are owned by petitioners-appellants Yonkers

Racing Corporation (the "Raceway") and St. Joseph's Seminary and College (the "Seminary"), respectively. Pursuant to the terms of the Consent Decree approved by the Yonkers city council (the "City Council") and entered by the district court on January 28, 1988, the City initiated, under pain of contempt, condemnation proceedings in state court against the Raceway and Seminary sites. Thereafter, the Raceway and the Seminary filed separate petitions against the City in the Supreme Court of the State of New York, Westchester County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to enjoin the condemnation of their respective properties. On May 27, 1988, Judge Sand ordered the City of Yonkers to remove the Article 78 proceedings to the district court.

The Raceway and the Seminary appeal from an order denying their motions to remand the Article 78 proceedings back to state court and from an order dismissing their Article 78 petitions on the merits. The district court held that removal was authorized under the federal removal statutes, 28 U.S.C. §§ 1441, 1443, and the All Writs Act, 28 U.S.C. § 1651. In addition, the court determined that the extraordinary nature of the proceedings warranted application of statutory exemptions from the notice, hearing and review requirements of the New York Eminent Domain Procedure Law (EDPL) and from the provisions of the State Environmental Quality Review Act (SEQRA). The district court also found that, even if such exemptions did not apply, there was such substantial compliance with the notice, hearing and review provisions of state law that petitioners' statutory rights were not violated. Finally, the district court considered the Seminary's first and fourteenth amendment free exercise challenge to the taking of its property and held that, since the inclusion of the Semi-

nary's property was an integral part of the Consent Decree and thus essential to efforts designed to remedy racial segregation in housing, no valid claim for a violation of the first amendment had been advanced.

On appeal, the Raceway and the Seminary principally contend that removal was improper under the federal removal statutes and the All Writs Act since only a defendant is permitted to remove and the City of Yonkers was a plaintiff, not a defendant, in the underlying condemnation proceedings. Petitioners further contend that not only are the exemptions to the EDPL and SEQRA inapplicable but that full compliance with the notice, hearing and review provisions of the statutes is required. The Seminary separately argues that the district court erred in rejecting its free exercise defense to the condemnation of its property without the benefit of a hearing to determine whether other reasonable alternatives exist to the taking of religiously owned and used property.

For the reasons that follow, we affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction, but solely on the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in all respects except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration.

BACKGROUND

The underlying facts of the Yonkers litigation are set forth in exhaustive fashion in Judge Kearse's recent opinion affirming the district court's finding of liability against the City under both Title VIII of the Civil Rights Act of

1968 (the "Fair Housing Act"), 42 U.S.C. § 3601 *et seq.*, and the equal protection clause of the fourteenth amendment, and therefore need not be restated here. For our purposes, it suffices simply to emphasize that this court concluded, as did Judge Sand, that " 'the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures[,] to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation.' " 837 F.2d at 1194 (quoting 624 F. Supp. at 1373).

To remedy the statutory and constitutional violations, the district court in part ordered the City to fulfill its pre-existing commitment with the Department of Housing and Urban Development (HUD) to provide sites for 200 units of public housing east of the Saw Mill River Parkway funded by HUD's Community Development Block Grant program. 635 F. Supp. at 1580. Following this court's affirmance of the housing remedy order, the City, in January 1988, entered into extensive negotiations with the Department of Justice and the NAACP concerning compliance by the City with its obligation under the Housing Remedy Order to designate public housing sites. Under threat of contempt sanctions by the district court for non-compliance with the Housing Remedy Order, the City eventually reached an agreement with the Department of Justice and the NAACP designating 7 sites on which to build a total of 200 units of public housing. The agreement was incorporated into the Consent Decree which required the City to initiate eminent domain proceedings, if necessary, to acquire these sites within 60 days. As part of the Consent Decree, HUD was to review and approve the

housing sites while the City was in the process of acquiring title to the 4 designated properties which were privately owned. Within 80 days of the entry of the decree, final HUD approval was to have been obtained and the City was to have solicited proposals from developers for construction of the housing.

Two of the privately owned properties included the Raceway site, a 1.2-acre parcel now used as a parking lot and currently slated for 24 units of housing, and the Seminary site, a 2-acre parcel on the border of the Seminary's 44-acre property and also currently slated for 24 units of housing. On January 25, 1988—the date that the City reached agreement with the United States on the Consent Decree—the Roman Catholic Archdiocese of New York on behalf of the Seminary issued a statement concerning the designation of the Seminary site:

> The Archdiocese of New York has been informed that there has been a recent decision to build units of affordable housing upon property now belonging to the Archdiocesan Major Seminary, Saint Joseph's, in the Dunwoodie section of Yonkers. Since it has been decided to proceed with these plans, the Archdiocese will do everything possible to promote the success of the effort. . . .

Advised of the Cardinal's intent to facilitate the construction of public housing on the Seminary site, Judge Sand welcomed the Church's participation and support. A month later, the City of Yonkers, pursuant to the terms of the Consent Decree, made offers of purchase to the owners of each privately owned site; the Archdiocese rejected the City's offer on March 18, 1988. On March 21, John Cardinal O'Connor wrote to Judge Sand stating that while the Archdiocese supported the addition of public housing

in Yonkers, it believed there were "serious problems in the current plan." Cardinal O'Connor expressed concern that four of the seven housing sites would be located in one parish in southeast Yonkers. The Cardinal also objected to the public perception that he had "volunteer[ed]" the Seminary site. His Eminence explained that he had decided in January to " 'yield graciously' " to the City, apparently believing (albeit erroneously, as it later became apparent) that the Seminary site would be condemned with or without his consent.

The district court responded by suggesting that the City and the Archdiocese consider substituting an alternate site in place of the Seminary property. In the interim, the court ordered the City of Yonkers to initiate eminent domain proceedings against the Seminary as well as against the Raceway, which also had rejected the City's offer to purchase its property. On April 24, 1988, two days after the City filed condemnation petitions in state court, the Cardinal declared that the Consent Decree was "fatally flawed." In addition, he said he was "deeply resentful" of the process which led to the condemnation action and which put the Archdiocese in the "humiliating position" of being perceived as "so resistant to making the property available that the court had to require the city to condemn the property."

The City of Yonkers then attempted to vacate the Consent Decree on the basis of a "mutual mistake" between the City Council and the Archdiocese. In support of its motion to vacate under Fed. R. Civ. P. 60(b) dated May 2, 1988, the City argued that the Cardinal's endorsement of the Consent Decree and his willingness to sell the Seminary site had been essential to the City's approval of the decree—the support of the Catholic Church being critical

in order to achieve acceptance of the housing plan by the City's residents, a substantial proportion of whom are Catholic. At oral argument on the motion to vacate, the district court determined that while the Cardinal's support for the Consent Decree had been a "welcome occurrence," it had not been so crucial that his subsequent withdrawal of support was sufficient to invalidate the decree. In any event, the court noted that, even assuming there had been a mistake, the proper course of action for the City was simply to propose a modification of the Consent Decree designating an alternative to the Seminary site. Judge Sand thereupon directed the City to meet with the Archdiocese to see if some accommodation could be reached.

Meanwhile, the Seminary and the Raceway filed answers with affirmative defenses to the condemnation petitions, and on May 11, 1988, instituted Article 78 proceedings against the City claiming that the proposed condemnations were "null and void." The parties also sought injunctive relief preventing the City from acquiring the two sites. By the end of May, once it became clear that the City and the Archdiocese had failed to reach any agreement regarding the designation of an alternate housing site and that the City Council would not propose any modification of the Consent Decree, the United States filed an order to show cause in the district court seeking removal of the Article 78 proceedings from state court. On May 27, 1988, the district court granted the order directing the City to remove the Article 78 proceedings to federal court and permitted the United States and the NAACP, plaintiffs in the underlying civil rights litigation, to intervene as respondents.

In ordering removal of the Article 78 proceedings, the district court explained:

> During the informal discussions which preceded entry of the consent decree, the question was raised whether [the] condemnation proceedings should be commenced in [the district] court or in state court. It was then the understanding of the parties that the sole issue which would be present in the condemnation proceedings related to value, that is, the amount to be paid to the property owner whose land was condemned by the City of Yonkers in implementation of the housing remedy order. It was with that understanding and intention that the consent decree did not contain a provision requiring that the condemnation proceedings go forward in [the district] court. . . .

Judge Sand also found a "significant risk" if removal were not ordered that the City of Yonkers "[would] be confronted with inconsistent orders from two courts [—] . . . an order of [the district] court to proceed with the condemnation of the two properties, and an order of [the] state court either not to proceed with that condemnation or to proceed pursuant to [procedures] and a timetable . . . inconsistent with [that] established by [the district] court." While the All Writs Act was, according to Judge Sand, to be invoked only as a "last resort," the court determined that, rather than allow the parties to go forward in state court knowing full well that there would be resort to the district court for injunctive relief against the implementation of any state court order inconsistent with the Consent Decree, the "more appropriate procedure" was for the district court to exercise removal jurisdiction over the Article 78 proceedings in the first instance. In sum, the court characterized the Article 78 proceedings as a "classic case" for invocation of the All Writs Act to effectuate removal.

Following removal, petitioners filed motions to remand the Article 78 proceedings to state court. On June 8, 1988, the district court heard argument from counsel on the motions to remand, the merits of the Article 78 proceedings and the City's motion to vacate the Consent Decree. With regard to the motions to remand, the court held that removal was authorized under the general federal removal statute, 28 U.S.C. § 1441, the civil rights removal statute, 28 U.S.C. § 1443, and the All Writs Act. The court further stated that removal was appropriate because the petitioners' defenses to the condemnations were best litigated in federal court with the benefit of an existing record, that removal would not deprive petitioners of their right to be heard on the merits of their Article 78 petitions, and that removal would eliminate the possibility of inconsistent orders from two courts.

On the merits of the Article 78 petitions, the district court concluded that the "emergency situation" provision of section 206(D) of the EDPL applied in the instant case to exempt the City of Yonkers from compliance with the notice, hearing and review requirements of the statute, and that the proposed condemnations were exempt from SEQRA pursuant to the court order provisions of SEQRA's implementing regulations. 6 NYCRR § 617.2(q). Moreover, according to the district court, the process by which the public housing sites were designated and reviewed constituted substantial compliance with the purposes of the notice, hearing and review requirements of state law.

As for the Seminary's free exercise challenge, the district court indicated that aside from the issue of the validity of the Seminary's claim of a protectible religious purpose for the two-acre site under the first amendment,

the alleged interference with the pastoral contemplative atmosphere of the only seminary in the Archdiocese had to be balanced against the need to vindicate the federal constitutional rights of those citizens of Yonkers who have been denied fair housing. In striking the balance in favor of vindication of fair housing rights, the court found the inclusion of the Seminary site in the Consent Decree to be essential.

Accordingly, the district court denied petitioners' motions to remand and the City's motion to vacate the Consent Decree,[1] dismissed the Article 78 petitions, and ordered the Seminary and the Raceway to "present to [the state c]ourt a proposed order stating that, insofar as all substantive grounds for objection to the proceedings in question have been . . . resolved in [federal c]ourt, . . . the eminent domain proceedings shall go forward in accordance with State law . . . to determine the sole remaining issue of valuation of [the] properties."

DISCUSSION

I. JURISDICTION

A. The Removal Statutes

Section 1441(a) of Title 28 provides in pertinent part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* . . ., to the district court . . . for the district . . . where such action is pending" (emphasis added). The civil rights removal statute, 28 U.S.C. § 1443(2), provides in pertinent part that any civil action commenced in state court "[f]or any act

1 The City of Yonkers has not sought appellate review of the denial of its motion to vacate the Consent Decree and indeed is precluded from doing so under the terms of that decree.

under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law" may be removed "by the *defendant* to the district court . . . for the district . . . embracing the place wherein it is pending" (emphasis added).

The initial question to be considered on this appeal is whether the City of Yonkers was correctly deemed by the district court to be a defendant for removal purposes under either statute. Appellants argue that Yonkers was not a proper party to petition the state court to remove the Article 78 proceedings since it was the plaintiff in the underlying condemnation proceedings, and the Article 78 proceedings were merely state law procedural vehicles for raising defenses to the condemnation petitions. *See Matter of Piotrowski v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511, 512 (3d Dep't 1984) (defenses to condemnation action are properly brought via an Article 78 proceeding); *but cf. Town of Coxsackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106, 107 (3d Dep't 1984) (challenge to condemnation may be made by way of an answer in that proceeding). In this regard, appellants cite two Supreme Court decisions, *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907) and *Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954), for the proposition that, regardless of the state's procedural provisions, where a party seeks to remove a condemnation proceeding to federal court, the condemnor is the plaintiff and the condemnee is the defendant.

The United States and the NAACP,[2] intervenors herein, respond by pointing out that the actions removed from

2 In the district court, the City of Yonkers opposed Judge Sand's assertion of removal jurisdiction over the Article 78 proceedings. In its

state court were the Article 78 proceedings, not the underlying condemnation proceedings. Indeed, the condemnation actions are still pending in state court. In the Article 78 proceedings, the City of Yonkers clearly was the defendant. Intervenors argue that the Article 78 actions were separate proceedings from the condemnation actions and that the *Mason City* and *Chicago, Rock Island* decisions are distinguishable.

Both Supreme Court decisions cited by appellants involved Iowa eminent domain statutes under which the condemnee was required to initiate a proceeding contesting the assessment of the condemned property's value arrived at by a sheriff's jury. In that separate proceeding, the condemnee was the plaintiff under state law. In each case, the Supreme Court held that in construing the removal statute, federal law determined who was the plaintiff and who was the defendant, *Chicago, Rock Island*, 346 U.S. at 580; *Mason City*, 204 U.S. at 579; *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (state procedural law cannot supersede privilege of removal granted by federal statute), and that the condemnor remained the plaintiff for purposes of removal.

Intervenors contend that the Article 78 proceedings were fundamentally different from the state court actions in *Mason City* and *Chicago, Rock Island*, which constituted challenges to property valuations. Their argument

---

brief on appeal, the City has again questioned whether the district court properly "divest[ed] the New York Supreme Court of jurisdiction to resolve the Article 78 proceedings." The City of Yonkers Brief at 8. Nevertheless, because in the City's view, "it would be wasteful to require the matters to be relitigated in the state court," *id.* at 9, the City has argued on appeal in favor of an affirmance on the jurisdictional issue as well as on the disposition of the merits of the Article 78 petitions.

essentially is that the issues decided in the removed Article 78 proceedings—whether the City complied with state procedural requirements, whether the sites were properly designated, and whether the condemnation of the Seminary site violated the first amendment—were separate issues resolvable apart from the question of the valuation of appellants' properties, the sole remaining question in the condemnation actions. On the other hand, as appellants persuasively point out, the defenses they raised in their answers to the condemnation petitions were identical to their claims in the Article 78 petitions.

In view of the foregoing, we have serious doubts in light of *Mason City* and *Chicago, Rock Island* whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the Article 78 proceedings to federal court. Quite simply, a party who is in the position of a plaintiff cannot remove. *Cf. White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) ("right to remove is statutory, jurisdictional and absolute"). Nevertheless, we need not resolve this difficult question since the district court asserted an independent basis for removal jurisdiction under the All Writs Act. We turn now to consideration of removal under that statute.

B. The All Writs Act

The All Writs Act (the "Act") provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act "authorizes a federal court in exceptional circumstances to issue such orders to persons 'who, though not parties to the original action or engaged in wrongdoing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses

court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172; *accord Pennsylvania Bureau of Correction*, 474 U.S. at 40.

The obligation of the City of Yonkers under the Constitution of the United States to remedy violations of civil rights is paramount. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Brown v. Board of Educ. II*, 349 U.S. 294, 300-01 (1955). The fact that petitioners were not parties to—and in their words "had absolutely no connection with"—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the All Writs Act.

This court previously has held that the All Writs Act enables a federal court in an exceptional case to exercise its "residual jurisdictional authority" to issue orders against non-parties to a civil rights action in order to vindicate the constitutional rights of existing parties. *See Benjamin v. Malcolm*, 803 F.2d at 53. In *Benjamin*, we affirmed an order of the district court joining, as third-party defendants pursuant to Fed. R. Civ. P. 19(a) and the All Writs Act, state officials who were " 'in a position to frustrate the implementation of a court order' " to alleviate overcrowding in New York City's detention center on Rikers Island. *Id.* (quoting *New York Telephone Co.*, 434 U.S. at 174). In rejecting the state's claim that the district court could not assert jurisdiction over state officials under the All Writs Act, we noted that the district court "was faced

with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions . . . and of avoiding the delay that would be entailed in the relitigation of those conditions." *Id.* Consequently, we held that exceptional circumstances justified the exercise of jurisdiction under the All Writs Act.

In the instant case, the record indicates that had the district court known from the outset that the Raceway and the Seminary would challenge the designation of their properties for condemnation as "null and void," the Consent Decree would have included a provision requiring that the condemnation proceedings be instituted in federal court, presumably under the "residual jurisdictional authority" of the All Writs Act. In retrospect, the assertion by the district court of jurisdiction in the first instance over the condemnation of petitioners' properties might have been a better course of action. We certainly would be less troubled by the use of the All Writs Act to initiate the condemnation proceedings in federal court had Judge Sand deemed petitioners to be necessary third parties to the implementation of the Consent Decree in the underlying civil rights litigation. Nevertheless, we must decide the case before us, and as a practical matter we see no reason why it is any less "necessary or appropriate" at this stage of the proceedings to invoke the authority of the All Writs Act. *Cf. In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (using All Writs Act to enjoin non-parties from *commencing* actions in state court where such proceedings would "threaten[ ] to frustrate proceedings in a federal action"). Moreover, were we to decide that removal was improper under the All Writs Act, the state court would be faced with a situation in which any order it issued that was inconsistent with the Consent Decree would be subject to the injunctive powers of the federal

court under the exception provisions of the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (federal court may not grant injunction against state court "except as expressly authorized by . . . Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (possibility of "conflicting orders from state and federal courts" sufficient to warrant injunctive relief against state court under 28 U.S.C. § 2283). Use of the All Writs Act in this case to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result.

In sum, we agree with the district court that this is indeed an exceptional case. While we too have confidence in the "ability, objectivity, [and] integrity of the state court" to render an appropriate decision in an Article 78 proceeding, the fact remains, as the district court recognized, that "the issues raised [by the Article 78 proceedings] go to the very essence" of the Consent Decree. If this case simply involved ordinary condemnation proceedings collateral to the implementation of the housing remedy order, that would be one thing. *Cf. Pennsylvania Bureau of Correction*, 474 U.S. at 40 (All Writs Act does not authorize federal court to order United States Marshals "to transport state prisoners from state prisons to the federal courthouse *in the ordinary course of litigation*") (emphasis added). But as the United States has recognized, "[t]he City's condemnation petitions, initiated pursuant to court order, must be seen in the context of the *Yonkers* [civil rights] litigation. The condemnor here is not the City acting in isolation[,] but the City acting at the behest of the court[,] the *Yonkers* plaintiffs and . . . 'the people who have been deprived of opportunities for housing free of racial discrimination.' " Department of Justice Brief at 37

(quoting Judge Sand, Transcript of Proceedings, June 8, 1988).

Despite the City's assurances through its counsel that it would vigorously defend against the Article 78 petitions, we have serious doubts whether a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order, could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "that the positions which the city would be compelled to take in [state court] would be significantly contrary to positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order.

Accordingly, we hold that removal was proper under the All Writs Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d at 384 (affirming issuance of injunction under Anti-Injunction Act because "issues being litigated in the state court proceeding could not be separated from the issues and relief involved in the federal court suit"). The implementation of that decree takes precedence over petitioners' desire to have the defenses to the condemnation of their properties litigated in state court. *Cf. North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45

(1971). Given the exceptional circumstances presented here, it is clear that the power of the All Writs Act extended over petitioners who were "in a position to frustrate the implementation" of the Consent Decree. *New York Telephone Co.*, 434 U.S. at 174. If the power exists to issue extraordinary orders under the Anti-Injunction Act and the All Writs Act to prevent the prosecution of state proceedings, surely in this case it also exists to effectuate removal notwithstanding the availability of an independent basis for the exercise of jurisdiction under the federal removal statutes. In any event, by removing the Article 78 proceedings to federal court, petitioners are not being deprived of their statutory right to assert defenses to the taking of their properties; they are merely being prevented from litigating those defenses in state court. We conclude, therefore, that because of the significant risk of inconsistent decrees from two courts, it was "necessary or appropriate" for the district court to invoke the residual jurisdictional authority of the All Writs Act.

II. THE MERITS OF THE ARTICLE 78 PETITIONS

A. EDPL

The Raceway and the Seminary contend on the merits that the City failed to comply with the notice, hearing and review requirements of Article 2 of New York's Eminent Domain Procedure Law (EDPL). In its condemnation petitions, the City claimed to be exempt from compliance with the procedural requirements of the statute pursuant to the "emergency situation" provision of EDPL § 206.

Section 201 of the EDPL provides that, "prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents

of the locality where such project will be constructed, shall conduct a public hearing." The hearing must be held on at least ten days prior notice, EDPL § 202, and following the hearing, the condemnor is required, within ninety days, to make findings and a determination of the public purpose to be served by the proposed condemnation. EDPL § 204. The factors to be considered in making such determination and findings include:

> (1) the public use, benefit or purpose to be served by the proposed public project;
>
> (2) the approximate location for the proposed public project and the reasons for the selection of that location;
>
> (3) the general effect of the proposed project on the environment and residents of the locality;
>
> (4) such other factors as [the condemnor] considers relevant.

Id. § 204(B).

A condemnor is exempt from compliance with the provisions of Article 2 of the EDPL when, *inter alia*, "because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article." *Id.* § 206(D). The district court found that "[c]ontrary to the claims of St. Joseph's and the Raceway, the City of Yonkers, in a very real sense, *is* faced with an emergency" (emphasis in original). As the court further explained, "[t]his matter must end" because it is "tearing Yonkers apart and Yonkers is bleeding."

We believe that the district court's factual finding of such an "emergency situation" is amply supported by the record. *See id.* § 207(C)(3), (4) ("scope of the review shall

be limited to whether . . . determination and findings were made in accordance with procedures set forth in [Article 2], and [whether] a public use, benefit or purpose will be served by the proposed acquisition"); *see also Gerges v. Koch*, 62 N.Y.2d 84, 476 N.Y.S.2d 73 (1984) (emergency situation presented by prison overcrowding warranted temporary exemption under New York City's Environmental Quality Review (CEQR) procedures, which parallel provisions of SEQRA, from filing environmental impact statement in order to begin renovation and construction of facilities as remedy for deprivation of constitutional rights of prisoners); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 466 N.Y.S.2d 668 (1983) (same, except pursuant to SEQRA); *City of Yonkers v. Hvizd*, 93 A.D.2d 887, 461 N.Y.S.2d 408 (2d Dep't 1983) (existence of emergency situation endangering public interest warrants application of EDPL 206(D) exemption); *Matter of Village of Malverne*, 70 A.D.2d 920, 418 N.Y.S.2d 93 (2d Dep't 1979) (same). More than two years after the issuance of the Housing Remedy Order and eight years since the commencement of the civil rights action, no housing remedy has been implemented. The public interest cannot wait any longer. We thus agree with the district court that the "1200 people on the waiting list for public housing in Yonkers have a right to a remedy," and in our judgment any further delay—aside from that which is necessary to address the first amendment claim of the Seminary as discussed in Part II. C. below—would be intolerable.

Appellants maintain that the only emergency in this case is the result of Yonkers own intransigence, and consequently that full compliance with the terms of the statute cannot be excused. We disagree. An assessment of blame regarding the predicament in which Yonkers presently

finds itself is quite frankly irrelevant to a determination of whether or not Yonkers is faced with an "emergency situation" under the statute. *Cf. Gerges*, 62 N.Y.2d at 95, 476 N.Y.S.2d at 78 (that municipal officials "might have foreseen and . . . made appropriate provision for . . . resolution" of emergency situation regarding constitutionally inadequate prison facilities "does not negate the existence of the present crisis"). Indeed, the very purpose of the exemption provisions under Article 2 of EDPL is to excuse compliance with the procedural requirements of the statute when the public interest so requires. *See City of Buffalo Urban Renewal Agency v. Moreton*, 100 A.D.2d 20, 473 N.Y.S.2d 278, 281 (4th Dep't 1984); *see also Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 305 (1986) ("principal purpose of Article 2 . . . is to ensure that [the condemnor] does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose").

Appellants concede that the construction of low income housing in Yonkers required by the Housing Remedy Order would serve a valid public purpose. In addition, as the district court stated, "[t]he process by which the public housing sites designated in the Consent Decree were determined, the notoriety of that process, the review already given to those sites and the continuing review . . . by HUD certainly satisfied the substance of the State law provisions upon which St. Joseph's and the Raceway predicate their claims." *See also Aswad v. City School Dist.*, 74 A.D.2d 972, 425 N.Y.S.2d 896, 898 (3d Dep't 1980) (holding that "substantial compliance" with exemption provisions of section 206 and four factors enumerated in section 204(B) was sufficient to confirm proposed condemnation). We agree that there was substantial compliance with the requirements of the EDPL in this case. During extensive

proceedings before the district court, the City's independent planning experts, the court-appointed Outside Housing Advisor, the Municipal Housing Authority and the City's Community Development Agency all participated in a thorough review of the location, distribution and suitability of the designated sites. With regard to the "general effect" of the proposed condemnations "on the environment and residents of the locality," EDPL § 204(B)(3), HUD conducted a preliminary evaluation as part of its ongoing review of the sites and reported to the district court that the housing plan appeared to meet site, neighborhood and environmental standards for public housing. *See generally* 24 C.F.R. § 941.202 (1988).

Consequently, given the undisputed public purpose inherent in the implementation of the Housing Remedy Order and the nature and extent of the review process, we are convinced that there was a valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL.

B. SEQRA

The New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101 *et seq.*, requires the preparation of an environmental impact statement (EIS) by state and local agencies "on any action they propose or approve which may have a *significant effect* on the environment." *Id.* § 8-0109(2) (emphasis added). Pursuant to regulations adopted thereunder, the Department of Environmental Conservation has determined the types of actions having such a "significant effect" ("Type I" actions) for which an EIS must be prepared. 6 NYCRR § 617.12. When an EIS is required, the full panoply of procedures prescribed under SEQRA comes into play. *See* ECL § 8-0109. If, on the other hand,

it is determined that the proposed action is one not likely to have a significant effect on the environment ("Type II" action), then such action "do[es] not require [an] environmental impact statement[ ] or any other determination or procedure" under SEQRA. 6 NYCRR § 617.13; *see Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304 (1986) ("the heart of SEQRA is the [EIS] process"); *see also* CPLR § 7803(3) (scope of review is limited to whether determination was "arbitrary[,] capricious or an abuse of discretion").

Although appellants concede that the proposed condemnations of the two sites are not Type I actions requiring the preparation of an EIS, *see* 6 NYCRR § 617.12(b), they argue nonetheless that an environmental assessment of the proposed condemnations should have been made to determine if there would be a significant impact on the environment. *See* ECL § 8-0109(4); 6 NYCRR § 617.6(a)(1)(i). However, as indicated in Part II. A. above, HUD is in the process of conducting an environmental review of the proposed housing sites pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. *See* 24 C.F.R. § 941.208(b) (1988); *see also* EDPL § 204(B)(3) (requiring consideration by condemnor of "the general effect of the proposed project on the environment"). Thus, the environmental assessment that appellants seek is in fact taking place.

In any event, we agree with the district court that the proposed condemnations of the Raceway and the Seminary sites are exempt from compliance with SEQRA. The implementing regulations to SEQRA expressly provide an exemption for actions "required to be undertaken pursuant to a judgment or order" and for "actions . . . of any court." 6 NYCRR § 617.2(q)(1), (5). Accordingly, in view

of the fact that the City was compelled by a federal court order to institute condemnation proceedings against the subject properties and that there was, as the district court found, a "meticulous inquiry" regarding environmental factors, we conclude that the requirements of SEQRA were satisfied in all respects.

C. The First Amendment

We come finally to the Seminary's challenge to the condemnation of its property on first amendment grounds.[3] In its Article 78 petition, the Seminary alleged that "[b]y the inclusion of the subject property in the [Consent Decree] and by the commencement of the condemnation proceeding, [the City] has attempted to regulate the use of church owned property without any compelling public interest and has sought the acquisition of the subject property in violation of . . . the First and Fourteenth Amendments to the United States Constitution." The Seminary's position is that, because the district court recognized on a number of occasions the availability of suitable alternate sites to the Seminary parcel and repeatedly stated its willingness to modify the Consent Decree should the City designate such an alternate site, no compelling need existed to justify the proposed condemnation of the Seminary's property.

3 The Seminary also challenges the proposed taking of its property under Article I, § 3, of the New York State Constitution. The Seminary did not make any argument in the district court or in its brief on appeal, however, based specifically on New York law. We thus are afforded no grounds to consider whether New York's "free exercise and enjoyment of religious . . . worship" clause provides any broader protection than the first amendment regarding the City's proposed acquisition of the Seminary site, *cf. Brown v. McGinnis*, 10 N.Y.2d 531, 225 N.Y.S.2d 497 (1962), and proceed therefore to consider just the Seminary's federal constitutional claim.

The first amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (first amendment free exercise clause is applicable to states through fourteenth amendment). In order to show that a particular governmental action implicates the free exercise clause, the aggrieved party must show that the challenged action—in this case, the condemnation of church-owned property—would coerce a violation of religious beliefs or would penalize the practice of religion by denying the aggrieved party "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1325 (1988). *See also School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (coercion); *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963) (penalty). The state may, however, justify any such limitation on religious liberty by showing that its action is essential to accomplish an overriding or compelling governmental interest. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046, 1049 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

The Seminary's free exercise challenge to the proposed taking of its property raises an issue which has only very rarely been presented. While the condemnation of church property for public use is not unheard of, *see, e.g., United States v. 564.54 Acres of Land, More or Less*, 506 F.2d 796 (3d Cir. 1974); *Foster v. Herley*, 491 F.2d 174 (6th Cir. 1974); *Kozemchak v. Ukrainian Orthodox Church of Am.*, 443 F.2d 401 (2d Cir. 1971), we are aware of no federal court case in which a religious organization has challenged the taking of real property on free exercise

grounds. The parties in the instant case, however, have discussed at some length a decision of the Colorado Supreme Court, *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973), in which this precise issue was considered, apparently for the first time.

In *Pillar of Fire*, an evangelical sect sought to enjoin a municipal urban renewal agency from condemning a church building said to have unique religious significance. The building was alleged to be *sui generis* and the birthplace of the Pillar of Fire denomination. However, the record contained no findings indicating that the trial court weighed the competing interests of church and state regarding the proposed condemnation. After expressing concern about "direct confrontations of the sort in this case [which] have been avoided because legislatures and administrative bodies have generally accorded *great respect* to religious organizations," 509 P.2d at 1254 (emphasis added), the Colorado Supreme Court remanded the case to the trial court for a full hearing. The court noted that the "loss of the Pillar of Fire [Church] would allegedly go far beyond the incidental burden of having to move to a new location" and, as a result of the competing interests involved, required that on remand a determination be made whether the state had a "substantial interest" in the taking of the alleged birthplace of the Pillar of Fire Church "without a reasonable alternate means of accomplishment" of its plans for urban renewal. *Id.* at 1253-54; *see Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *cf. Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (condemnation of 40-acre tract of farmland owned by church would not substantially interfere with church's school program since more than 900 acres would remain after taking), *cert. denied*, 429 U.S. 887

(1976). Although the Colorado court conceded that church property could be taken by eminent domain for "paramount public use," 509 P.2d at 1254 (citation omitted), the court nonetheless concluded that the church was entitled to a hearing on the merits of its first amendment claim.[4]

In support of its claim of a free exercise infringement, the Seminary, during the June 8, 1988 proceedings before the district court, relied principally on an affidavit of Monsignor Edwin O'Brien, the Rector at St. Joseph's, who stated that the Seminary grounds, including the two acres designated for public housing, form an "apron" of quietude surrounding St. Joseph's and contribute to the "atmosphere of quiet reflection" essential to the "academic, spiritual, psychological and pastoral" preparation of young men for the priesthood. Monsignor O'Brien also averred that the two-acre site together with the remaining forty-two acres of church property have been used for religious purposes by the Archdiocese at least since the opening of the Seminary in 1896 and that "the construction of multi-family housing. . . . [would] substantially affect our work at St. Joseph's," the only facility in the Archdiocese for the training of new priests.

4 On remand, the trial court found that, despite Pillar of Fire's allegations to the contrary, the church property was neither the birthplace nor the mother church of the Pillar of Fire denomination. When the case returned to the Colorado Supreme Court on appeal, the court upheld the trial court's subsequent finding that the church property was not *sui generis* and also cited evidence from the record supporting the state's "weighty and substantial" need for the property. *Denver Urban Renewal Auth. v. Pillar of Fire*, 191 Colo. 238, 552 P.2d 23, 25 (1976). In the court's view, even had Pillar of Fire proven that the church building was *sui generis*, the record now indicated a substantial state interest in the condemnation of the building without an alternate means of accomplishing the urban renewal project. Accordingly, the Colorado Supreme Court affirmed the trial court's decision allowing the condemnation of the Pillar of Fire Church.

The district court considered without resolving the question of whether the taking of the Seminary's property would constitute an interference with the free exercise rights of the Archdiocese. Counsel for the Seminary argued before the district court that, because the use of the two acres would substantially affect the work at the Seminary, the condemnation of the site would violate the first amendment. He added, however, that that "doesn't mean . . . the church could not agree voluntarily . . . to the use of the property . . ., but [the property] is not going to be . . . willingly subjected to condemnation under this plan." Clearly perplexed by the "varying positions" of the Archdiocese regarding the inclusion of its property as part of the Consent Decree, the district court described the Seminary's claim of religious interference as equivocal: "if there [is] agreement by the Archdiocese with the overall plan, it [would] allow the use of this property, and that would not interfere with free exercise rights; but since the Archdiocese has reservations . . . with respect to the overall plan, it is resisting the taking on free exercise grounds." Nevertheless, the district court assumed the validity of the Archdiocese's claim of religious use of the property and proceeded to balance the competing interests of church and state, finding that the purported constitutional necessity to include the Seminary property into the Consent Decree outweighed the Seminary's first amendment rights.

The Seminary argues on appeal that "while it is very true that a remedy for the proven segregative policies of the City is necessary, it is just as true that the Seminary property is *not* necessary to that remedy." Reply Brief at 22 (emphasis in original). The Archdiocese further contends that the City's refusal to modify the decree because it believed there were no "politically acceptable" alternatives to the Seminary site is hardly a sufficient reason to

justify infringement of a first amendment privilege. In the Seminary's view, therefore, the district court's conclusion concerning the compelling need for the Seminary's property was simply not supported by the record.

Appellees respond first by claiming that under *Lyng* the Seminary was unable to show that the condemnation of its property would have a coercive or penal effect on the practice of religion. *See* 108 S. Ct. at 1325. In *Lyng*, members of three Indian tribes in northwest California challenged a United States Forest Service plan to build a paved 75-mile road connecting two towns, Gasquet and Orleans, on a 6-mile stretch of land located in the Six Rivers National Forest that, *while owned by the federal government*, traditionally had been used by the Indians for religious purposes. The Forest Service commissioned a study of the American Indian cultural and religious sites in the Chimney Rock area of Six Rivers which found that the region was integral to Indian religious ritual, and that "privacy, silence, and an undisturbed natural setting" were necessary to the practice of their religion. *Id.* at 1322. The report accordingly recommended that the roadway not be completed. The Forest Service decided, however, not to adopt this recommendation and proceeded to select a route through the Chimney Rock area as far removed as possible from the archeological and other sites used by the Indians for spiritual activities. Alternate routes specifically were considered and rejected "because they would have required the acquisition of *private land*, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.* (emphasis added).

The Supreme Court in *Lyng* held that notwithstanding the undisputed severe adverse effects completion of the

proposed roadway would have on the practice of the Indians' religion, "[w]hatever rights the Indians may have to the use of the [Chimney Rock] area . . ., those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 1327 (emphasis in original) (citation omitted). While recognizing that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment," the Court noted that "[t]his does not and cannot imply that *incidental* effects of government programs, which may make it more difficult to practice certain religions but which have no *tendency* to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 1326 (emphasis added).

Appellees seize upon the first amendment principles considered in *Lyng* in support of their contention that the free exercise clause does not prohibit governmental action that would substantially interfere with the practice of religion so long as the government's conduct is not actually coercive or penal in nature. We disagree. The *Lyng* Court declined to determine the "exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs." *Id.* The Supreme Court merely held that "whatever" the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land. *Id.* at 1327 (citing with approval *Bowen v. Roy*, 476 U.S. 693, 724-27 (1986) (O'Connor, *J.*, concurring in part, dissenting in part) (distinguishing between government's use of Social Security number in its possession to aid administration of welfare programs and the government's *requiring* individual to

provide such information)). Besides, as Judge Lumbard has recognized, the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property. *See Wilson v. Block*, 708 F.2d 735, 742 n.3 (D.C. Cir.) (Lumbard, *J.*, sitting by designation) (distinguishing *Pillar of Fire*), *cert. denied*, 469 U.S. 956 (1983). Incidental burdens on the practice of religion will not suffice to require the state to come forward with a compelling reason justifying its actions. When, as is claimed in this case, however, a proposed governmental action would substantially effect the practice of religion, there exists at least a material issue of fact concerning whether the state has interfered with the free exercise of religion. *Cf. Lyng*, 108 S. Ct. at 1326; *see Wisconsin v. Yoder*, 406 U.S. at 218; *see also Johnson v. Katz*, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 65 (1986) (lack of "material issue of fact" warrants dismissal of Article 78 petition without a hearing); CPLR § 7804(h) (requiring hearing on any "triable issue of fact").

The Seminary's initial willingness to sell the two-acre parcel in January 1988 does not alter our determination that the proposed taking of the Seminary's property raises a significant question under the first amendment. As the district court itself stated, "if [the] taking [of] these two acres [constitutes] an interference with [the] free exercise of a religion[,] that is the case regardless of what the attitude of the church is to the overall [housing] plan." There is in our judgment an enormous difference between the Archdiocese agreeing to sell its property and the government proceeding to condemn it. We certainly do not take lightly the Seminary's claim of interference with a first amendment right. In any event, the district court assumed for purposes of its decision the validity of the Seminary's

claim of religious interference. To have held otherwise, the district court would have had to hold a plenary hearing on the issue. Indeed, since the record before us does not reflect a considered judgment on the religious interference question, we do not preclude the district court on remand from addressing this issue. Nevertheless, we too accept as true for purposes of this appeal the Archdiocese's allegations that the taking of the Seminary site would "substantially affect [the] work at St. Joseph's" and that the site is "essential" to the Seminary's mission. *Cf. Pillar of Fire*, 509 P.2d at 1253-54.

Turning to the question of whether the condemnation of the Seminary's property is essential to achieve a compelling state interest, it is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternate means of accomplishing the state's compelling interest are available. *See Brandon v. Board of Educ.*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also Sherbert v. Verner*, 374 U.S. at 406; *Pillar of Fire*, 509 F.2d at 1253. Consistent with the district court's disposition below, appellees assert that the inclusion of the Seminary property in the Consent Decree is essential to the implementation of the Housing Remedy Order.

We do not agree that this is necessarily so. Although the district court considered the universe of reasonable alternate sites to be limited to those "capable of being utilized in a federal decree [with] a reasonable timetable for implementation," the court also clearly recognized the availability of such sites since it was willing to permit the City to designate a substitute for the Seminary property. Thus, the City's steadfast refusal to propose a modification of

the Consent Decree to delete the Seminary site does not provide a sufficient basis to justify interference with petitioner's first amendment rights. While the City now takes the position that the "framework for remedying the constitutional violation found by the district court cannot be modified simply by substituting sites [because t]here are no politically acceptable alternatives," City of Yonkers Brief at 35, the fact remains that political expediency is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right.

Consequently, assuming as we do for purposes of this appeal that the taking otherwise impermissibly burdens the Seminary's free exercise rights, the Seminary is entitled to be heard on the issue whether the taking is necessary to vindicate a compelling state interest. At such a plenary hearing with expert testimony from both sides and in which the competing interests of church and state are fully addressed and the availability of reasonable alternate sites seriously considered, the district court will be able to determine whether the public interest in remedying discrimination can be reasonably accomplished without the taking of the Seminary's property. The point is that on the basis of the existing record before us, we are not in a position to make an intelligent judgment in this matter one way or the other. The protections afforded by the first amendment require at the very least that the Seminary have a full and fair opportunity to have its rights considered in an attempt—consistent with the "great respect" courts accord religious groups—to avoid a direct confrontation between church and state. *See Pillar of Fire*, 509 P.2d at 1254. If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interest might be. *See Lyng*, 108 S. Ct. at 1327-28 ("[n]othing in our

opinion should be read to encourage governmental insensitivity to the religious needs of any citizen[; t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices") (citation omitted); *Wisconsin v. Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. at 406-07.

• • •

One final word is in order. The patience exhibited by the district court under enormously trying circumstances is commendable. Judge Sand has always kept sight of the decisive objective in this case: "[t]hat is, to build the [200 units of] housing as quickly as possible in a manner . . . which will enable future generations in Yonkers to look back and say this was the best possible housing in the best possible locations [that could be built] under the circumstances which obtained in 1988." We trust that the district court will find some way to facilitate reconciliation among everyone concerned in this case so that implementation of the first leg of the Housing Remedy Order can begin as quickly, and hopefully as smoothly, as possible.

CONCLUSION

We affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction under the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in every respect except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration consistent with the views expressed in this opinion. The mandate shall issue in 7 days, and it is so ordered.

Affirmed in part, vacated and remanded in part.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent. In my view, the Article 78 proceedings were improperly removed and should be remanded to state court. Accordingly, I would not reach the merits.

The facts respecting the removal are straightforward. The City commenced condemnation proceedings against the Raceway and the Seminary, as required by the Consent Decree, on April 21, 1988. The Raceway and the Seminary filed answers and, on May 18, 1988, filed Article 78 petitions as well, presumably for protective reasons.[1]

On the morning of May 27, 1988, before any significant action had been taken in state court with respect either to the condemnation or Article 78 proceedings, the district court signed an order to show cause bringing on, later that morning, a motion by the United States in the federal litigation to compel the City to petition for removal of the Article 78 proceedings to the federal district court. The motion was granted, and the City so ordered, later that day. Accordingly, the City filed a petition for removal on

1 *Compare Piotrowsky v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511 (3d Dep't 1984) (defenses to a taking of property by condemnation properly raised by initiation of separate Article 78 proceeding), *with Town of Cocksackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106 (3d Dep't 1984) (such defenses may be raised by answer in condemnation proceeding). The Raceway and the Seminary posed the same defenses both by answer in the condemnation proceedings and in their separate Article 78 proceedings; the latter also sought to enjoin the condemnation proceedings.

section 1441, "defendants," presumably a distinction without a difference), and the Supreme Court has twice held that whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes. *See Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954); *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907). In both those cases, as here, a complaining landowner was required by state law to initiate an action to raise objections to condemnation, in which action the landowner was denominated the "plaintiff" by state law. Both cases held the landowner/condemnee was the defendant for federal removal purposes, regardless of state law, and therefore the only party that could remove the case to federal court.

In all candor, given the clear language of the pertinent statutes and the equally clear holdings of two Supreme Court decisions, I do not regard this question as difficult, or even close. Removal is manifestly not warranted by 28 U.S.C. § 1441 (1982 and Supp. IV 1986) or 28 U.S.C. § 1443 (1982). This brings us to the All Writs Act, 28 U.S.C. § 1651(a) (1982). *Cf.* 28 U.S.C. § 2283 (1982) (federal court stay of state court proceedings).

Echoing the rationale expressed by the district court, the majority concludes that "because of the significant risk of inconsistent decrees from two courts, it was 'necessary or appropriate' [within the meaning of 28 U.S.C. § 1651(a) (1982)] for the district court to invoke the residual jurisdictional authority of the All Writs Act." The majority notes also that, in light of the history of the underlying federal litigation, the City is likely to be a reluctant and ineffective party to the state condemnation proceedings, whatever assurances it may give to the federal district court in that regard.

In reaching this conclusion, the majority cites and discusses the leading Supreme Court case on this issue, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), but never sets forth the basic rule articulated in that case for a situation where, as in the case of removal, other federal statutes address the issue or situation before the court. That rule is:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Id. at ____, 106 S. Ct. at 361.

Pennsylvania Bureau of Correction held that the pertinent habeas corpus statute, which stated that the writ should be directed "to the person in whose custody the party is detained," did not authorize direction of the writ to a noncustodian; and that the All Writs Act should not be invoked for that purpose in view of the statute specifically addressed to the situation and making a different provision. *Id.* at ____, 106 S. Ct. at 360-61. The court, added, however:

> There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore

leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

Id. at ____, 106 S. Ct. at 361.

When the issue which this court must decide is properly framed in terms of the controlling authority of *Pennsylvania Bureau of Correction*, it is apparent that the removal undertaken below and approved by the majority here was not warranted by the All Writs Act. Whatever the difficulties in the underlying federal civil rights litigation, to which of course the Raceway and the Seminary are not parties, I see no warrant for a preemptive strike upon a state court which had not even begun to consider the eminent domain proceedings pending before it.

Both the district court below and the majority here acknowledge the "ability, objectivity, [and] integrity of the state court." The officers of that state court are, it might be added, sworn to support the Constitution of the United States. U.S. Const. Art. VI, cl. 3. Accordingly, the state court was entitled to a presumption at the outset of the condemnation proceeding that it would proceed with sensitivity to and awareness of the legal and social context in which the condemnations are occurring.[3] In sum, there was no basis to disregard the "principles of equity, comity and federalism," *see Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Kerr-McGee Chemical Corp. v. Harti-*

3 It was similarly premature to allow removal on the assumption that the City would be a reluctant condemnor when, whatever weight is accorded to that hypothesis, the United States and/or the N.A.A.C.P. could seek to intervene in the state court proceedings, and it appears likely that such an application would be granted. *See* N.Y. Civ. Prac. L. & R. 1013 (1976); *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 434 N.Y.S.2d 66 (4th Dep't. 1980).

gan, 816 F.2d 1177, 1181-82 (7th Cir. 1987), which should govern our consideration of this issue.

The authorities cited by the majority in support of removal are easily distinguishable. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), construed the All Writs Act to authorize an appeal of a district court determination that it had jurisdiction over a dispute whose resolution, in the Supreme Court's view, Congress had entrusted exclusively to the Federal Trade Commission. There is no question here that the state court is an appropriate forum to deal with eminent domain proceedings under state law.

The All Writs Act was invoked in *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987), to allow the addition of state defendants in a lawsuit challenging overcrowding in New York City jails where the state was dilatory in accepting transfer of prisoners, thus precluding correction of constitutional violations, and relief could not practically be achieved without the decreed joinder. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), is similar. Again, there is no question here of adding parties in order to achieve an effective remedy. *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), found authority in the All Writs Act to enjoin non-parties from commencing state court actions which would undermine the impending settlement of a multidistrict federal class action, a situation totally afield from the present litigation.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974), found warrant in an express exception to the Anti-injunction Act, 22 U.S.C. § 2283

(1982),[4] to prohibit defendants in a federal school desegregation suit from pursuing a state court action invoking a state statute expressly designed to frustrate school desegregation, noting the possibility of "conflicting orders from state and federal courts." *Id.* at 384.

Perhaps my colleagues' invocation of the *Swann* decision best highlights my disagreement with the majority's ruling. The defendants who were enjoined in *Swann* were principals in protracted federal school desegregation litigation who initiated state court proceedings likely to result in orders pursuant to state law which would contradict and undermine the desegregation orders of the federal court. Here, on the contrary, the Raceway and Seminary are not parties to the underlying federal civil rights litigation, and invoke only the normal rights under New York and federal law of owners of property designated for condemnation by a public authority. It would, of course, be ludicrous to enjoin the Raceway and the Seminary from participating further in the state condemnation proceedings. Since only such an injunction would put this case on all fours with *Swann*, it is clear that *Swann* provides no authority for the course followed here.

There was no analogue in *Swann*, moreover, to the action of the district court here in removing the Article 78 proceedings from state court, purporting to determine all the substantive issues in that proceeding the same day the removal occurred, and then directing the parties to present a proposed order to the state court, before which the related condemnation proceedings remained pending,

4 22 U.S.C. § 2283 (1982) provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

reciting that all the substantive issues in the condemnation proceedings had been decided and the state court should accordingly proceed "to determine the sole remaining issue of valuation."

I am afraid that the fevered and highly publicized situation in Yonkers has led both the district court and my colleagues to a novel and unwarranted application of the All Writs Act which is abusive both of the condemnees and, more importantly, of the most elementary principles of the comity that should exist between federal and state courts. I would not, of course, following *Pennsylvania Bureau of Correction*, rule out the use of the extraordinary residual authority provided by that statute if future circumstances warrant its invocation. In my view, however, its application in the circumstances presented by this record was manifestly premature and improper. I therefore respectfully dissent.

EXHIBIT L—First Remedial Consent Decree in Equity, Dated January 28, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenor,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 Civ 6761 (LBS)

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	*Maximum Density*
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting

*If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties

agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in The *New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

*The parties acknowledge that HUD's processing time for such approval is 30 days. The parties understand that HUD will expedite the approval process if possible.

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

Section 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

Section 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

Section 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multifamily housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

Section 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

Section 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median

income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

Section 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

Section 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

Section 18. The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing develop-

ments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more "widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

Section 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

Section 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 28, 1988

Plaintiff,
The United States of America

By: /s/ Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

Attorneys for Plaintiff

Plaintiff-Intervenor,
Yonkers Branch—National Association
for the Advancement of Colored
People

By: /s/ Michael H. Sussman, Esq.

SUSSMAN & SUSSMAN
30 South Broadway, Suite 418
Yonkers, New York 10701

Attorneys for Plaintiff-Intervenor

Defendants,
The City of Yonkers and Yonkers
Community Development Agency

By: /s/ Michael W. Sculnick, Esq.

VEDDER, PRICE, KAUFMAN, KAMMHOLZ &
DAY
1 Dag Hammarskjold Plaza
New York, New York 10017

By: /s/ Edwin E. McAmis, Esq.

10/

SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022

Attorneys for Defendants The City of Yonkers and Yonkers Community Development Agency

SO ORDERED:
/s/ Leonard B. Sand, U.S.D.J.

Dated: January 28, 1988

EXHIBIT M—Transcript of Hearing Dated January 19, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

January 19, 1988
10:00 a.m.

Before:

Hon. Leonard B. Sand, District Judge

Appearances:

Michael H. Sussman
Brian Heffernan
Manuel Vargas
Michael W. Sculnick
Edwin E. McAmis
John H. Dudley, Jr.
Raymond LaRizza
Richard R. Rowley

(2) The Court: By virtue of the random assignment of courtrooms we meet this morning in the courtroom most recently occupied by Judge Edward Weinfeld, who passed away this weekend. One does not lightly enter a courtroom so filled with memories of that great man or sit in the seat he so recently occupied without remembering the marvel he was.

I first had the privilege to come to know Judge Weinfeld some 35 years ago when I served as a law clerk in this building for another distinguished federal jurist, then District Judge Irving R. Kaufman. Even then, 35 years ago, Judge Weinfeld was a well respected and admired judge. In the ensuing years his reputation deservedly grew and was enhanced. Everyone who had the privilege of knowing and working with Judge Weinfeld grew to love him, and, as strong as our love for him was, was his love and respect for this court. No one was more devoted to the work and the traditions of this court than Edward Weinfeld, and he set an inspiring example for us all. He is very much with us this morning.

We will adjourn these proceedings at 11:30 this morning to enable attendance at Judge Weinfeld's funeral. Whether we reconvene at 3:00 this afternoon or some other date will depend on the events of this morning. The court has cleared its docket for the entire week, and we will sit as often and as long as it is productive for us to do so.

In this court's order of December 15, 1987, setting this conference, the court wrote: "The mayor and members of the city council of Yonkers are requested but not directed to attend this conference."

May I ask Mr. Sculnick, are they in attendance?

Mr. Sculnick: Yes, you Honor. I would like to introduce to the court Mayor Wasisko, Nicholas Longo, Mr. Fagan—the remaining four members are caught in traffic. They are on the way. The city manager is also caught in traffic, Neal Deluca.

The Court: Very well. I appreciate their attendance or planned attendance at this session.

Mr. McAmis: Your Honor, would this be an appropriate time for me to introduce myself? I am Edmond McAmis of the Skadden Arps firm and we are here, along with Mr. Sculnick, representing the city. This is our first appearance of the firm in

the case. With me is Professor Charles Haar of Harvard Law School. He is consultant to our firm, our Boston office. Also present are my young colleague Mark Scnabel, and our partner Judge William Mulligan expected to be here this morning but is laid up with a bad back and asks to be excused.

The Court: Certainly. In the court's order of December 15, 1987 I indicated that at this conference: "The (4) court will call upon the representatives of Yonkers to advise what affirmative actions if any Yonkers is taking or planning to take to implement the housing remedy order."

I think that the best way to approach that is at the beginning, although it is not easy, given the long history of conditions in Yonkers, and of these proceedings, to determine exactly where the beginning point is. But I think it is most appropriate that we begin with the Housing Assistance Plan, commonly referred to as HAP.

So my first question to the representatives of the city of Yonkers is whether Yonkers has adopted a Housing Assistance Plan. I remind the parties that in this court's written order of July 1, 1987, the court provided in paragraph 14:

"On or before July 9, 1987"—I am not misspeaking. "On or before July 9, 1987, the city shall adopt and submit to HUD, with copies to the court and the parties, a Housing Assistance Plan, a HAP, for its Year 13 Community Block Development Grant Application. The HAP shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well defined prior commitments undertaken and the terms of the housing remedy order."

Has the City of Yonkers adopted a Housing Assistance Plan pursuant to that order?

(5) Mr. McAmis: Your Honor, if I may address that question—

The Court: First by answering yes or no and then you may elaborate.

Mr. McAmis: Yes.

The Court: It has adopted a Housing Assistance Plan consistent with that order?

Mr. McAmis: I am advised by Mr. Sculnick that that was for the second year of the three-year program that was set up in the 1986 housing remedy order.

The Court: Has the City of Yonkers, by action of its city council, adopted a Housing Assistance Plan in compliance with the commitment it undertook first in 1980 with respect to 100 units, and then in 1981 with respect to 200 units?

Just so there is no ambiguity, Mr. Kenneally, will you distribute copies of this letter to the parties and to those seated in the jury box.

Is your answer yes, that the city council has done that?

Mr. McAmis: The fact is, your Honor, the city council adopted a second year. What remains outstanding and to be done is the third year of this three-year program.

The Court: Do you have a copy of what it is that the city council did, as provided by that order, that (6) you can furnish to the court and the parties?

Mr. Sculnick: Your Honor, in accordance with the July 1 order, the city council adopted resolution 140 of year 1987, which attached a second-year increment of the HAP. That was adopted on July 7, 1987 in direct response to the July 1 order. As Mr. McAmis is now indicating, the issue that is now present is the third year increment to the HAP which was due, I think, about at the end of October. So it is a new HAP that we are now talking about, not the HAP that was a response to your July 1 order.

The Court: Is there now, at this moment, in effect by adoption by the city council of Yonkers a Housing Assistance Plan in compliance with the commitment undertaken in the document dated July 9, 1981, which has just been distributed and which was entered as an exhibit during the liability hearing, consistent with the court's order?

Mr. Sculnick: Yes, your Honor. There are in effect the 200 units of public housing, if that is your question. There is no HAP in effect in the third year increment of the 1985 through '88 HAP that was entered by this court's order in June of 1986. There is no impediment to the 200 units, your Honor. If that is your question, there has been no HAP that has been adopted by the council, which is the third year of the three-year happen.

(7) The Court: Mr. LaRizza, is HUD satisfied that the city council of Yonkers, as of this moment, has adopted a current effective HAP?

Mr. LaRizza: Your Honor, I am not sure that I can respond to that. If the question is has the city taken the steps necessary to prepare for the 200 units, if that is included in the three-year goal then it would appear that they are in compliance. To ask whether or not they are now qualified for all the other funding, I really can't answer that question. I have had no notice and I haven't had an opportunity to check with HUD to determine that.

(8) The Court: July 1, 1987 was the date of this order, and it was the understanding then of all parties as reflected in this order and the events which preceded this order that the City Council had not adopted such a HAP. I can take judicial notice of the fact that there have been two occasions subsequent to July 1, 1987 when the matter came before the City Council and no affirmative action was taken.

What has transpired since July 1, 1987, Mr. Sussman?

Mr. Sussman: Yes, Judge. As Mr. Sculnick, I believe, indicated, your Honor, the deadline for the adoption of the third-year HAP is October, October 1. The City Council in December at Mr. Oxman's initiative twice considered and twice tabled for apparently lack of votes the third-year HAP which is should have been adopted and and now be in effect. It has not been adopted. It is not in effect.

Without getting into any other issue, I believe there are letters in the files but I didn't bring them here today and I can't make them part of the court's record, that the city has specifically requested a delay or delays in adopting that; and we stand today without it being adopted for at least three months after its timeliness, and I don't really understand the claim that it has been. It (9) hasn't been, and everyone knows it hasn't been.

I am sort of stunned that we are debating a factual matter which I think we have all been dealing with in recent weeks with knowledge that it has not been properly adopted. I don't understand what claims are being advanced to the contrary.

Mr. McAmis: Your Honor could I comment?

The Court: I know it is an easy to resolve because if there is any ambiguity at all, then the City Council can reconvene, and the City Council can very clearly unabmiguously confirm its intent and commitment to construct 200 units of publicly assisted housing in East Yonkers.

You will note in the document that has just been distributed that in July 1981, as a condition to the receipt of federal funds, it was stated in the first sentence on page 3:

"The city is required to take all actions within its control to provide for the construction of 200 newly created units of new or substantially rehabilitated rental housing."

This was the prior year's HAP that dealt with 100 units. Pursuant to that understanding and commitment, during the period 1980 to 1984, the City of Yonkers received $19,760,000 in federal funds, in addition to which, (10) there has been accrued but not yet released to Yonkers because of conditions which bring us to court this morning the sum of $10,184,000.

I am under the impression and belief that there is no HAP in effect in Yonkers. One should resist the temptation to say that Yonkers is in a HAP-less state, but that is my impression and belief, and if that is erroneous, it is a rather simple matter for the City Council to convene itself in a special session as soon as the rules and regulations of the City Council permit, and I understand that, to permit a meeting of City Council, and either adopt, as I believe has not been adopted, adopt the HAP or take other action in compliance with the directive.

Mr. Sussman?

Mr. Sussman: Judge, I just think that the record should be clear, Mr. Sculnick indicated the three-year period '85 to '88, '85-86,'86-87,'87-88. It's the last year, it's our understanding, there is no effective HAP, just so that we understand what we are talking about. There is a HAP under the conditions that you earlier alluded to, the order of the court—

The Court: There has been a HAP passed every year until this year.

Mr. Sussman: No, two of them were deemed passed by action of the court because the city did not comply, but (11) we are not talking about that history. I am not. I am trying to focus on the '87-88 year, which is the current federal fiscal

year. There is no HAP, to my knowledge, for that year. That is the third segment that's being discussed.

If there is some contrary knowledge, I certainly have never seen a resolution for that fiscal year, and I think that is what the court is addressing.

The Court: I am addressing it. Let me indicate why I am addressing it—I will hear you in due course—and I addressed it in the July order:

There are two techniques by which the court can proceed. It can proceed by deeming things to have been done which it was the obligation in the first instance of Yonkers to do, or it can order Yonkers to do those things.

There are limits and disadvantages to the practice of deeming things to have been done. One cannot deem housing to have been built. The building of housing is a complex matter which requires a multitude of proceedings and actions.

The court views the adoption of a HAP, understanding that the obligation to have a current HAP and to build the 200 units of housing goes back to 1980 and 1981, independently of this lawsuit, and understanding that $30 million is involved in that, as having some serious but (12) symbolic value. The City of Yonkers and its elected representatives and all others who speak for Yonkers simply have to come to grips with the fact that there is a commitment on the part of Yonkers to build 200 units of housing in East Yonkers; that a federal court has ordered them to do so, that stay applications were denied by this court, the Court of Appeals, and the full Supreme Court of the United States; that subsequent to that time the Court of Appeals has spoken in an opinion which I believe all students of this court will believe is a unique opinion.

Let me read just one paragraph from that opinion. After summarizing the examples of segregative action and intent, the Court of Appeals wrote:

"Neither this summary nor our more detailed summary in an earlier part of this opinion recounts all of the evidence that supports the district court's finding that the city's housing decisions were intentionally segregative. Given even that fraction of the proof recited here as to the impact of the city's decisions, the sequence of events, the procedural deviations, the conven-

ient disregard of substantive standards, and the explicit and veiled statements of racial concern, we regard as frivolous the city's contention that the evidence is insufficient to support the district court's finding that the city made its subsidized housing decisions with a segregative purpose."

(13) For months this court has heard two excuses advanced for inaction on the part of the city. The first was the unique circumstance of a City Council which was going to be contracted in size with the consequence that City Council persons were running against each other. That event is now past.

The second circumstance was that the case was on appeal. That circumstance is now past.

The court directs that no later than this Thursday, January 21, 1988, the City Council of Yonkers adopt a HAP for the year in question which, in the terms of the order of the court of July 1, 1987, shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well-defined prior commitments, undertakings, and the terms of the housing remedy order.

The time has come—let me speak colloquially—the time has come for an end to the game-playing. Everyone in this courtroom knows what is meant by the adoption of that HAP, and what its terms and provisions should be; but let me say further, to regard the HAP and the passage of a HAP as being a statement by all who speak for Yonkers, that there is an acceptance of the obligation to comply with the orders of a federal court; and that with that goes a good-faith cooperation and participation in the (14) process of implementing the housing remedy order.

If there is no intent to do that, then don't pass the HAP and suffer the consequences, and I will make those consequences very clear. But let's not engage in hypocritical game-playing. There is a moment of truth for Yonkers. Yonkers will comply with the housing remedy order or it will be in contempt, it will be in bankruptcy; the Emergency Financial Control Board, a representative of which I understand is present this morning, will take those actions which are appropriate and necessary for that body to take; appropriate notice will be given to the governor of the State of New York to take such actions as are appro-

priate when a city is in contempt and on the verge of bankruptcy.

The issues transcend Yonkers. They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails. The issues before this court this morning are no less significant than that.

Pursuant to the court's order of July 1, 1987, as amended by this oral direction, unless the City Council adopts that HAP, the substance of which we have already (15) discussed, by 4:30 on Thursday, it will be in contempt of court.

Please put your hand down, sir. I will call on you when it is appropriate.

Unless such a HAP is adopted by 4:30 on Thursday, the fines set forth in Paragraph 16 of the court's order of July 1, 1987 will be due and payable, which means that commencing this Thursday, Yonkers will be in contempt and shall be fined at a daily rate pursuant to the following formula:

(a) $100 for the first day of noncompliance after entry of a finding contempt and notice.

That is taking place now.

The daily rate shall be doubled for each consecutive day of noncompliance. Said fine shall be payable by a check drawn to the Clerk, Southern District of New York, and the City Manager shall cause said check to be delivered to the Clerk of the court by 4:30 p.m. on each day that the Clerk's office is open, representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on which the Clerk's office was not open.

The proceeds of said check—please listen and understand this carefully—the proceeds of said check (16) shall be paid into the Treasury of the United States for general purposes, and shall not be earmarked, escrowed, or otherwise allocated

for any special purpose or fund. The amount of funds previously paid shall not be refundable.

Understand that once those fines are paid, unless an appellate court sets them aside, there is no way short of an act of Congress that the City of Yonkers will recover those moneys.

I am sure many in Yonkers have done their arithmetic, and I am sure the Emergency Financial Control Board has done the arithmetic and knows the precise point at which Yonkers will be bankrupt.

The court directs, as it did in July but I understand the direction is not really necessary because there is a representative of the Emergency Financial Control Board present, that that body be apprised of this court's order, and of the potential for Yonkers being bankrupt in a matter of weeks.

I say again to Yonkers, here is the issue in a clear and simple form. It does not deal with any details or niceties with respect to particular sites. It deals with the overall commitment to comply with the orders of the court, and if the Yonkers City Council is not prepared to do that, don't pass the HAP and you will by the process which I have indicated discover that the construction of (17) the housing will go forward but it will go forward under the most expensive, the most divisive, conditions possible.

Mr. Sculnick, is the order and direction of the court understood?

Mr. McAmis: Quite clear, your Honor.

The Court: Yes. Thank you.

Mr. McAmis: May I address the court?

The Court: Yes. I just want to make sure, is there anyone to whom that order is addressed, any representative of the City Council or the City Manager or anyone else, who has any doubts or fails to understand what it is that the court has directed in open court and in their presence?

Sir, You wish to be heard?

Mr. McAmis: Your Honor, if it may please the court, this is a matter, this HAP is one of several matters that I have had discussions about in the last couple of days with Mr. Sussman and Mr. Heffernan. I believe that we have a solution. It has been discussed, however, in the context of a wider-ranging dis-

cussion in which we have endeavored to determine whether there is any way in which this housing remedy order can be complied with.

The Court: I am aware, if I may interrupt you, I am aware that there have been some such discussions, and indeed, I granted with enthusiasm the request that was made (18) for an adjournment of this hearing, which was originally scheduled for January 11, to permit those talks to go forward, and I had hoped that this morning's conference would be a conference in which one addressed the process of healing the wounds, stopping the hemorrhaging of funds which results from this litigation; and I am distressed that that has not taken place.

Certainly I recognize, I think everyone in this courtroom recognizes, that a consensual resolution to this is preferable to the type of confrontational order which has typified these proceedings thus far, and the reason why I focused on the HAP, I have stated, I think it involves a commitment; and unless and until Yonkers is prepared to say, "We recognize that that is our obligation," then the rest becomes just details.

I also recognize one other thing. Let me say it and then I will permit you to make your statement:

This court is acutely aware of the consequences of an order such as the order that I have just entered on the entire community of Yonkers. I received submissions some months ago in which concern was expressed about the bond rating given by Standard & Poor's and Moody's to the City of Yonkers.

If the gentlemen and ladies who are involved in municipal financing pick up their papers tomorrow and learn (19) how close Yonkers is to bankruptcy, the consequences of that, I think, are very clear.

Also, I think everyone in this courtroom is cognizant of the fact that if the economy of Yonkers is depressed, for whatever reason, those who will suffer first and most are the members of the class on whose behalf this action was taken.

We are going to recess at 11:30 this morning. The court is glad to make available to the members of the City Council and to their attorneys and anyone else a caucus room. I recognize that formal meetings of the City Council have to take place on certain notice, and I believe in Yonkers.

If you wish to come back later today and say that you have caucused with the City Council and there is a firm commitment on the part of a majority of the City Council to adopt the HAP and to express to the court and to the parties the intention of the City of Yonkers to comply in good faith with the obligations to implement the housing remedy order, then that cloud that hangs over Yonkers can be lifted, and then we can address what other affirmative actions Yonkers will take or will not take to implement the order.

There are a multitude of specific actions which Yonkers can take, and if you wish to do that, fine. I will (20) welcome that.

Mr. McAmis: Your Honor, it is exactly in an effort to bring this litigation to a conclusion, this painful litigation to a conclusion, and to do it in a way other than a way that is the most expensive and most divisive, that we have had these discussions to which I referred earlier.

The Court: Can you just in broad terms tell me what the status of those discussions is?

Mr. McAmis: In a sentence, we have had discussions during this last week, and I have had other meetings, caucuses with the City Council, and we have discussed a range of issues. We believe that progress has been made.

Do we have a settlement at this point? No, but it is my position on behalf of the city that there has been enough movement and enough progress here that these discussions should be allowed to go on for a brief additional time to see whether we can come to a conclusion.

The Court: Do you represent to the court, based on the advice which you have received from your clients, that those discussions are going forward in good faith, not merely as a dilatory ploy, and with the intent and commitment that as a result of those discussions a consent housing remedy order will be submitted to the court?

(21) Mr. McAmis: I certainly can represent absolutely that these discussions are going on in good faith. That is what I am—

The Court: I make a sharp distinction—I am sure you are aware that I phrased my question carefully—I am not in any sense questioning the good faith of counsel, but there are re-

ports abroad that groups in Yonkers have been assured that this is simply a holding action to gain more time. More time against what? I don't want to usurp the role of counsel for Yonkers, but I think a fair assessment of the consequences of the tone and substance of the Court of Appeals' decision is that compliance with the housing remedy order is an inevitability for Yonkers.

Would you like to recess until 3 o'clock this afternoon?

Mr. McAmis: Well, your Honor, on that point, let me just respond. I think that there is a new spirit. The new young mayor of Yonkers said at his inauguration address publicly, "This mayor obeys the law."

The Court: I welcome that remark.

Mr. McAmis: Also, I have attended numerous City Council meetings since our firm was retained, by which I mean caucuses generally, and I have found the majority on the Council to be cooperative in this effort, and they have indicated that they want this effort to be undertaken.

(22) The Court: Recess. Let's recess. Caucus, come back and tell me that a majority of the members of the City Council have authorized you to state unequivocally that the City of Yonkers is committed to a good-faith implementation of the housing remedy order, that the City of Yonkers in good faith wants to discuss the specifics of the timetable for implementing that. We can do that in a matter of hours.

Mr. McAmis: Your Honor, as in any other negotiation, it doesn't seem to me well thought out to have the specific terms talked about in a public courtroom.

The Court: I am not suggesting that. I am suggesting that there is one thing which is simple and is clear, and that is the HAP and the commitment. And frankly, in all candor, unless and until the City of Yonkers says to the court, "There is a new spirit in Yonkers, a spirit which is not of obfuscation and delay, but of compliance and good-faith commitment," then the input of the City of Yonkers has to be taken in the context of the absence of such a commitment.

Gentlemen, I see your hands. I know you wish to be heard.

Mr. McAmis: Your Honor, the City Council has assured me that they do wish to proceed to try to work something out.

The Court: When do you wish this court to (23) reconvene?

Mr. McAmis: Judge, I think the parties would be willing to talk to the court in chambers if you want to know what these negotiations are about. There are no secrets from the court. But I don't see that it's going to be fruitful to come back to a public courtroom until we have a deal.

The Court: But you see, there is no deal with respect to the HAP. There is no deal with respect to the 200 units. I will not agree to any compromise or settlement which in any way dilutes the obligation of the City of Yonkers to build those 200 units of housing. I am certainly prepared to consider and to discuss with the parties any consentual resolution with respect to the long-term housing plan; but the parties shouldn't deceive themselves. The commitment for that 200 units is a longstanding commitment, as evidenced by the document distributed this morning, for which Yonkers received all those sums of money.

Apropos of which I have a further order and direction:

The court hereby orders and directs that the $19,760,000 heretofore received by the City of Yonkers in federal funds pursuant to the agreements and commitments with HUD shall be deemed to be held in trust by the City of (24) Yonkers for the purposes of implementing its commitment with respect to the housing remedy order.

Mr. Heffernan, would you on behalf of the court, do the preliminary work necessary for the opening of an escrow account to hold so much or all, if necessary, of the $19,760,000 in federal funds which the court has deemed Yonkers to hold in trust. Disbursements from that fund are to be made only pursuant to a written order of this court.

This court reserves the right at any time to require the City of Yonkers to fund that trust, that is, to deposit in that account cash or liquid marketable securities in the amount of $19,760,000, and to authorize the expenditure from that account of such funds if any as shall be necessary to implement the housing remedy order.

One other matter, and that is, unless and until these proceedings are resolved, Yonkers is in a state of crisis. It is tottering on the brink of bankruptcy. It is tottering on the brink of having its elected officials replaced by appointed officials. Given

that posture, I would like to request but if necessary I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this court pending a resolution of this issue.

Is that understood by all?

Mr. McAmis: Perfectly clear, your Honor.

(25) The Court: Yes.

Mr. McAmis: In view of your direction, and in view of the way this proceeding has gone this morning, may we convene as you suggest privately, that is, the City Council, the mayor and I, and may we then report back to you at a convenient hour this afternoon?

The Court: 3 o'clock this afternoon?

Mr. McAmis: Very well.

The Court: We are adjourned until 3 o'clock this afternoon. Court is adjourned until 3 o'clock this afternoon.

(26) Afternoon Session

3:40 p.m.

The Court: Mr. McAmis, during the period of the recess have you had an opportunity to confer with your clients?

Mr. McAmis: Yes, your Honor. At the direction of the court and when the adjournment took place, I have met with the new mayor of Yonkers and with those city councilmen who are in court today, who are a majority of the entire council. I am authorized to represent to the court that, in the first place, a meeting of the council will take place at 5:00 tomorrow afternoon, Wednesday afternoon, that the appropriate calls for that meeting have gone out. I point out, incidentally, that that is as soon as Yonkers could meet under its rules, the Yonkers council.

Those council members who are here today have authorized me to state that they will support at that meeting a resolution that will put in place a currently effective HAP acceptable to HUD which will reaffirm the commitment of Yonkers to accept funds to build the 200 units of public housing that the court has discussed this morning and required.

The Court: Those persons whom you conferred with constitute a majority of the council?

Mr. McAmis: They do, your Honor.

(28) In addition, your Honor, as I have indicated, discussions have been taking place which are looking to, and hopefully will result in, a resolution of the housing side of this case by consensual agreement. By that I mean, we have had discussions with respect to both the siting and density of the 200 units of public housing, and we are also discussing a plan relating to the long-term aspects of the housing remedy order. I believe that these discussions should be continued, and in order to allow them to be continued and concluded I would make an application that the court adjourn this matter and reconvene at 10:00 on Monday for that purpose.

The Court: What is the position of the Department of Justice?

Mr. Heffernan: Your Honor, the Department of Justice is amenable to an adjournment until 10:00 on Monday to explore the possibilities of a settle.

The Court: What is the position of the NAACP?

Mr. Sussman: The NAACP believes that the time will be well spent and that there will be a possibility by Monday of a settlement between the city and the clients we represent.

The Court: Is there any party who objects to the adjournment?

(28) I will adjourn all proceedings in this case until Monday at 10:00 a.m. I am not certain whether we will be in this courtroom or some other courtroom on Monday, but there will be a notice posted.

I want there to be prepared and submitted to the court, on notice to the parties, prior to 10:00 a.m. on Monday an order which in the absence of a consensual agreement will represent, hopefully, the joint views of the Department of Justice, the NAACP and HUD, with respect to the designation of sites, the unit capacities, the unit allocations, the date for the issuance of requests or proposals with respect to those sites, and any other matters necessary to move implementation of the housing remedy order forward, so that the court will be in a position on Monday either to be advised of the existence of a consensual resolution, and at least the substance if not the specific details

of that consensual resolution, or to execute an order which will move this forward.

I grant any adjournments with great reluctance. I think the parties are fully aware of the fact that I will not countenance delay for the sake of delay. But I would certainly think that an adjournment of a week is appropriate if in fact there is a good-faith basis for believing that that interval of time will enable a consensual resolution of this matter.

(29) There are a number of other matters, including various requests for the lifting of stays. Is there any objection to the lifting of the stay, if indeed there was a stay, with respect to the proposed progressive development applications? Anyone object to the lifting of that stay?

Mr. Sussman: Your Honor, is that Dr. Malik's application?

The Court: Yes.

Mr. Sussman: No objection by the NAACP.

A Voice: Preservation Development Corporation, your Honor.

Mr. Heffernan: The United States has no objection, your Honor.

The Court: I am not certain that that development was ever encompassed within the stay, but in any event that stay is lifted.

With respect to all the other applications for the lifting of the stay, those motions are adjourned until Monday at 10:00 a.m.

On a different subject matter, dealing with the school aspects of the case, is there a desire for oral argument with respect to Dr. Pastor's most recent recommendation? Is there a desire for oral argument on that?

Mr. Sussman: None by the NAACP, your Honor. I (30) don't believe it is necessary.

Mr. Dudley: None by the school board, your Honor.

Mr. McAmis: Could I reserve on that until Monday, your Honor? I just need some time to consult the appropriate people.

The Court: Please advise the court of that on Monday and I will either set a date for a hearing or I will take the matter under submission.

Mr. Sussman: For a hearing or oral argument?

The Court: I don't believe an evidentiary hearing. It would simply be oral argument.

Are there any other matters that should appropriately be addressed this afternoon? Anyone else who wishes to be heard?

Mr. Odom, how much time do you wish?

Mr. Odom: Only a couple of minutes, your Honor. As a dissident member or activist in the black community, I am here today with other activists from the black community who live in the city of Yonkers and who your remedy directly affects. We have made various attempts to communicate our desires to the NAACP and our dissatisfaction with the way they have handled this case until this point. We have been unable to communicate with these people because they have held meetings where they (31) took no new business and would not allow us to present our case to them. On other occasions they have had the police department escort us out of the building.

The Court: What is your application to this court?

Mr. Odom: We are asking, your Honor, that you withhold any decision as to housing in the city of Yonkers until we, as the members of the black community, are allowed to have some input into our fate. Your decision in this court affects us and our children. Our children are bussed against their will and we stand a chance of losing our community by simply transferring poor people to the white community from the west side of Yonkers.

The Court: You may submit to me in writing any matters which you believe should be brought to my attention. Please do so by 4:30 on Friday so that I will have had an opportunity to read it prior to the Monday hearing.

Mr. Odom: We have hired an attorney, Conrad Lind, your Honor. Would it be permissible for him to submit this on our behalf?

The Court: Certainly. Understand that I am not conferring standing or intervention. I am simply assuring you and those you represent that if I receive by 4:30 on Friday anything that you wish me to consider, I will have read it and considered it prior to Monday.

(32) Mr. Sussman: Judge, would you direct that a copy of this be submitted to counsel for the last?

Mr. LeBoeuf: He just interrupted like that. How does he—

The Court: Be quiet, please. I am running these proceedings.

Mr. LeBoeuf: I am sorry.

Mr. Sussman: Could I please ask that any such submission be provided to counsel so it can be understood what the complaints are?

The Court: Yes. Anything else?

Mr. Odom: Thank you very much, your Honor. This is the first time we have had justice in this entire lawsuit.

Mr. Dudley: Judge, I have one miscellaneous matter. I know Mr. Sussman has filed a supplemental application for attorneys' fees. On behalf of the board I want to make it clear that we do not oppose that application. We find the application to be reasonable, both as to the hourly rate and as to the hours claimed. The only reason I rise at all is that I am somewhat concerned with the mechanics of payment, both with respect to that submission when an order is entered and with respect to the order that has been entered on Mr. Sussman's original application. The board and its budget do not have a reserve for claims of this kind. In the (33) ordinary course of business we submit claims or judgements such as this to the city, to be paid from the city's budget, and we would anticipate doing that in this instance. I just wanted to make that clear because we are not objecting as such to the reasonableness of the application.

The Court: On the subject of fees, has the City of Yonkers made payment to the outside housing adviser as directed by the court?

Mr. Sculnick: It is my understanding that it has, your Honor, yes.

The Court: Mr. Newman, is it your understanding that they have been paid?

Mr. Newman: No, they have not paid the outstanding amount for June, July, August, September. They have paid the November bill but not the outstanding 35,000.

The Court: Prior to the next session of court I assume that that will have been paid.

Sir, would you state your name and who you represent and how much time you wish.

Mr. LeBoeuf: Just a few minutes, not even a few minutes. My name is Clayton LeBoeuf, sir, and I am in Yonkers 40 some years. I am president of the Afro-American Citizens Association.

The Court: Is that an organization—

Mr. LeBoeuf: Yes, for 12 years, chartered by (34) the State of New York.

The Court: Is that the same organization that Mr. Odom is associated with?

Mr. LeBoeuf: No, sir, it is not. We have heard of a lot of dollars being spent in the names of black people that this case affects, directly affects, and we talked about up until the present time, your Honor, $30 million spent

The Court: What is your application to the court?

Mr. LeBoeuf: My application is that I am asking you, and I picking a gentleman that I do not even know him, to ask you for any disbursement of money in the name of NAACP or anyone else, that we understand where this money is going. I am not speaking in terms of Mr. Newman and the six people that made 60 million. I am saying that you have made a statement that the court approved that these people be paid, because the NAACP has spent a lot of money. We are saying that the national grant says that they are to receive this money—

The Court: Tell me, what is it that you want the court to do?

Mr. LeBoeuf: We want the City of Yonkers not to pay any legal fees until such time as we the people, who the money was spent against their better judgment, to put (35) that money in escrow just like you did the 19 million until you decide who is to get the money.

The Court: That application is denied.

Mr. LeBoeuf: I thought it would be but I wanted it to be on the record. Thank you.

The Court: Let me clarify the matter. I made a fee allowance to the counsel who appeared in this case and the parties who appeared in this case. If there is any internal dispute as to allocation of funds within the NAACP, that is a matter which

can be addressed separately and is not a matter with which this court is concerned.

Mr. LeBoeuf: Thank you, your Honor.

The Court: Anything further?

We are adjourned until 10:00 a.m. on Monday, in a courtroom to be designated.

In

EXHIBIT N—Transcript of Hearing Dated July 26, 1988.

(115) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

YONKERS, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

July 26, 1988
10:15 a.m.

Before:

HON. LEONARD B. SAND
District Judge

— — —

(In open court)

The Court: I'm pleased to report that in several respects there has been significant progress in implementation of the housing remedy orders since the parties were last before me. First with respect to the two hundred units of public housing to be built on the seven sites previously designated there has been an agreement reached with HUD and the parties with respect to the essential terms to be contained in the requests for (116)

proposals to be issued soliciting bids from prospective builders of those units. The exact language of the RFPs is being worked upon, but the substantive provisions of the RFPs have been agreed upon after an extended meeting, and I must say that the court is very pleased with the attitude of all the parties at that meeting. Although on some issues there were differing points of view the sense was that everyone was acting in a constructive fashion.

The second area in which significant progress has been made relates to the selection of the executive director for the office of fair housing implementation, and the court and the parties met yesterday with several applicants for that position. Again there was a consensus that the applicants were all extraordinarily well qualified people. We asked each applicant why there was an interest in this position and the response was uniformly that Yonkers and the housing conditions in Yonkers present a unique challenging opportunity. None of the applicants said things had been so bad they can only get better. One might read that between the lines. In any event the court will announce certainly by the middle of next week the person to serve as the executive director having conducted the interviews and having received the recommendations and comments of all of the parties. The third area in which there has been (117) significant progress relates to the affordable housing ordinance. I have been advised by the parties that after meetings and discussion there has been agreement as to the provisions of that ordinance. We had all hoped that the exact text would be available prior to the commencement of these proceedings. The mechanicals are being prepared in the Abeles Schwartz office and I am advised will arrive sometime between 11:00 and 11:30 this morning. I think the sequence in which we take up matters is significant, and what I would propose that we do is that we now adjourn until 12:30, so that we will all have had an opportunity to review the text of the ordinance, so that counsel can satisfy themselves that it is faithful to the agreements that they reached and that we can then proceed with that matter having been laid to rest. Does anyone have any problem with that sequence of proceedings?

Mr. Sculnick: Your Honor, not with respect to the sequence of the proceedings. Just a brief comment on your prior statement this morning regarding the RFP for the two hundred units. The city would like to take this opportunity to restate its position in favor of the townhouse or semi-detached style which I believe was the intent of the consent decree and our hope that through the RFP process that design eventually comes to pass. We understand the need to proceed with the issuance of the RFP (118) and understand the nature in which it will be issued, but we take this opportunity to express our hope that a townhouse style is used on all of the cites.

The Court: We're adjourned then until 12:30.

(Recess)

The Court: I have marked as Court Exhibit A of this date a document the title of which is this chapter shall be known as the affordable housing ordinance, city of Yonkers. Am I correct that each of the parties has received a copy of this document and reviewed it?

Mr. Heffernan: Yes.

Mr. Sculnick: Yes.

The Court: Are there any objections on the part of any parties to the substance of this document?

Mr. Sussman: There are a number of changes.

The Court: Court Exhibit A is a document I received from Mr. Newman and it is a typed document which has the following changes in it.

On page 3 paragraph C now reads to provide for changes in existing zoning requirements and increases in land use densities.

On page 11 paragraphs 2 and 3, one-eighth has been changed to three-eighths. That is an obvious typographical error.

On page 14 paragraph 4 the last three lines read (119) as heretofore provided in this paragraph shall not toll the rung of the 30-year period referred to in subparagraph 2 hereof. Some mechanical changes.

On page 15, paragraph C third line reads endeavor to give occupancy priority in the following order to.

On page 19 the first full paragraph third line there has been stricken the phrase a certain number or percentage of.

On page 20 paragraph 14(b) line 4 the phrase "is available to" is stricken and "shall" is substituted.

On page 21 the second sentence reads the office of implementations shall forward its recommendations to the Yonkers planning board and city council.

On page 23 paragraph P third line the word "that" is stricken.

Page 24 there is added to subparagraph U the sentence the developers shall simultaneously transmit such written statements and supporting documentation to the Yonkers board of education.

Page 25 the last two sentences are transposed, and the last sentence now reads, after the word request, otherwise the application shall be deemed approved.

Mr. Sculnick: One other change, your Honor. On page 22—this has not been discussed by the parties—subparagraph K I've been advised the proper name for the (120) register—that the proper title is state or national registers of historic places, not historic preservation, so the word preservation should be replaced with places.

The Court: That's right. Historic places instead of preservation.

My question to each of the parties then is there any objection to the substance contained in Court Exhibit A which is the document you've previously been furnished corrected in the manner that I've just indicated?

Mr. Sculnick: Yes, the city reiterates its objections made to the long-term plan order upon which this is based. We've cooperated with the preparation of this order based upon the issuance of the long-term plan order, but our objections to the substance of that order are reiterated here, which have already been ruled upon by the court.

The Court: You object to there being a long-term plan.

Mr. Sculnick: And we object to various specific aspects which I think we argued about on June 8.

The Court: But with respect to those matters which have not been previously ruled upon by the court are there any objections to the substance of Court Exhibit A?

Mr. Sculnick: No, there are not, your Honor.

The Court: And are there any objections on (121) anyone's part?

Mr. Sussman: Yes, your Honor, the NAACP objects to the documents as drafted because we feel as we've argued in papers submitted to the court that this structure should not be used, but that's a separate issue.

The Court: But I'm dealing now in terms of planning, zoning and the substantive provisions.

Mr. Sussman: No, no other objections.

Mr. Heffernan: We have no objections.

The Court: All right. That brings us to the questions of the manner of implementation. And the court has before it two proposals. There is the proposal contained in the proposed order of the Department of Justice which one might refer to as the classic contempt—the order, the notice, the opportunity to be heard and then the inposition of contempt sanctions. There is also the proposed order submitted on behalf of the NAACP which takes the route of the affordable housing commission. That is the route which says in essence Yonkers, the Yonkers city council, you have abdicated. You are irrelevant. We will proceed to implement the housing remedy order by an entity other than the Yonkers city council.

My question which I direct in the first instance to the Department of Justice and the NAACP is why should we not do both? We now have a specific document, Court Exhibit (122) A with respect to which there are no substantive objections raised by the city of Yonkers not previously ruled upon by the court. There's a very specific step which the city council of Yonkers could be directed to take—that is, to adopt this ordinance. If Yonkers' city council should fail to adopt this ordinance then as proposed in the Department of Justice order there would be what I have referred to as the classic contempt remedies including fines, personal fines directed to those responsible for the acts of contempt including possible imprisonment for civil contempt. Why should there not be in addition to or as a supplement to those classic remedies for contempt the additional potential consequence of contempt—the creation of the commission which replaces the city council. In other words, the mes-

sage to the city council would be this you must do. This you must do by a specific date. If you fail to do this by the specific day there may be visited upon you all of the sanctions set forth in the Department of Justice proposed contempt order. In addition to that the court and the parties are not going to sit by while the contempt scenario is being played out in every form it may take, but there will also be visited upon Yonkers' city council what is perhaps the ultimate sanction and that is the removal from the city council insofar as implementation of the housing remedy order is concerned, its responsibility for these (123) matters. Mr. Heffernan, do you have any problem with that?

Mr. Heffernan: Yes, your Honor, I do.

The Court: Tell me what your problem is. It is essentially saying that the court adopts and signs your proposed order but supplements it by notifying the parties that in addition to these sanctions if and when it comes about, in addition to the sanctions contained in your order there is the further available sanction which is what we call the commission route. What problem do you have with that?

Mr. Heffernan: Your Honor, obviously we agree with the first portion of that which would be the imposition of contempt sanctions. I think the problem that arises with the commission down the road is that we don't think we're there yet. We think it's important that the city retain some input into this.

The Court: You think we're not there yet. But if we get to the point, August X, if the city council shall have failed to adopt this, if the fines and other sanctions shall have continued do you preclude the possibility that we might at that stage be at the point you feel we have not yet reached?

Mr. Heffernan: At that stage I would admit the possibility of the court taking further action. Whether the commission route is the appropriate action to take I'm not (124) prepared to say at this point. I think basically, your Honor, to put out there the spectre of a commission at this point is to somehow allow the city to take the ultimate copout, to say if we wait long enough and the court is going to impose this commission,

is going once again to allow us to avoid any accountability for our actions—

The Court: Isn't that really an argument? I'm deliberately not for a number of reasons at this point establishing the roadmark—let me shift the analogy—I am not at this point establishing the triggering event which would make appropriate the appointment of the commission. What I am seeking to establish—I am simply putting the parties on notice for obvious due process reasons that this too is a possible sanction and what I am saying is Mr. City Councilman X, if you feel that it is appropriate for you to cause Yonkers as a city to suffer these fines, if you think it is appropriate for you personally to sustain these fines and these imprisonments, this potential imprisonment, and if this goes on for a period of time we're not just going to permit everything in Yonkers to go down the drain, because there is still one other thing which is available to us and that is simply to say insofar as implementation of the housing remedy order is concerned we proceed without you. I think it would be inappropriate, it would be counterproductive at this point to say but if the contempt (125) continues for X number of days, then it would be appropriate. I suggest to you that if the deadline comes and Yonkers is in contempt—I should say in further contempt, I have already stated my view that Yonkers is at present in contempt—we will certainly be all assembled together.

I'd like to make one other comment about your reference to the emergency financial control board in your order and in your memorandum. I think that that is a very appropriate reference, and indeed I have on previous occasions directed that orders and transcripts of proceedings be furnished to the emergency financial control board. I was frankly disappointed when at an earlier stage of these proceedings the city of Yonkers proposed that it be subject to a $29 million judgment if it succeeded in defeating the obligation to construct 200 units of public housing. And I had thought that that proposal was so fiscally irresponsible that the emergency financial control board would simply not permit it to be made. If there is reason, as your papers suggest, to believe that the EFCB is prepared to act in the face of what otherwise would be fiscal disas-

ter for Yonkers and all of its citizens, then it would be very welcomed and certainly again in terms of the sequence of these events were there to be a contempt—that is, a failure to adopt Court Exhibit A—and were there to (126) be a realistic basis for believing that other state agencies might intervene certainly that would be a very compelling argument against the necessity of contempt, so that really all that I'm proposing, and that's why I expressed some surprise that you had difficulty with it, was the classic contempt route, which is what your order proposes, with the additional element again as an inducement to compliance which is what civil contempt is intended to do. It is intended not to punish but to induce compliance—that, if necessary, there is available the further device of removal of the city council from further responsibility.

The other point with respect to the commission if there ever becomes an alternative is that of necessity. There would have to be some actions taken by the city council such as funding, so that I think the concern about letting the city council off the hook is somewhat diluted by the fact that they would have to fund it, and from time to time when appropriate they could be called upon to ratify the actions taken by the commission. Shall I hear from Mr. Sussman?

Mr. Heffernan: Your Honor, one last comment. It doesn't seem that what you're proposing is very much if at all different from the order we submitted to the court two weeks ago which indicated there would be a contempt fine route to be possibly followed at some point in the future.

(127) The Court: It's different in some respects and I don't quarrel with that. One significant difference in my view is that there's now a very specific discrete act which the city council can be called upon to perform. We did not have two weeks ago and we now have this ordinance.

When the court first raised and raised tentatively the notion of a commission I think I indicated then that I did not regard it as being mutually exclusive from other types of remedies—that it was simply another possible sanction.

I might also say that what the court envisioned is a radically different commission from the one contained in the NAACP's proposed order. The main virtue of the commission in my view

is the assurance given to private builders and developers that proposals that they advance will not be sabotaged or reviewed in a hostile climate. I had not envisioned the creation of an additional level of bureaucracy and whether there will ever come a time when a commission is appropriate I think we may know in a week or so. I might add that this is a matter with respect to which I would also like to have the input of the soon to be appointed executive director of the office of fair housing. But the short answer is I'm not disagreeing with your last comment. Mr. Sussman.

Mr. Sussman: The NAACF, as the court is aware, (128) strongly opposes the options which you have laid out today and I want to spend a few minutes explaining why. This is really very difficult because I'm convinced from seven and a half years that the court certainly wants implementation of the order. There's no doubt in my mind as to that. There's great doubt in my mind as to whether any official of the city of Yonkers does and whether there is wisdom in the proposals that the court has laid out and I have very grave concerns at this time as to the views of my clients and the responsiveness of the remedy process to their needs. If we were talking here about the need to have the city council of Yonkers or some administrator within the city of Yonkers do a single act the virtue of the court's proposition would be much less assailable because a civil contempt route is a time honored route, and the force of civil contempt is almost clearly such in almost every instance particularly where fines are substantial and prison contemplated to yield the desired results, but as in Cleveland, Boston, Alabama, as in so many cases where federal courts have been faced with obstreperous and hostile defendants—in Yonkers that is not the situation. We're not here talking about the doing of a single act, and for the court to rather repeatedly define the situations that we face incrementally as forcing the city to take a single act in my view is frankly totally off base. That is not what we're doing (129) here.

The fact that the city council of Yonkers would pass an ordinance under a threat of contempt or fines or bankruptcy is irrelevant, absolutely irrelevant in my view to what we're about here. It doesn't matter at all. Because of course if we start fin-

reason to believe that if the city council passes this ordinance it will mean in the situation that is being created, which is if you don't you'll be fined, personally, the city, contempt, jail and all the rest—that will have any significance whatsoever for the city of Yonkers in implementing this order. In fact it will simply create a precedent that every time you want to do something we should push them to that wall. That is craziness. It is not intellectually honest at this stage of the lawsuit to move back from the structural change necessary. It sends the black community and the Hispanic community the worst possible message, which is that forever (133) these people can get away with it, and the court will simply not act. I think the court thinks it's acting. I recognize the court feels that it's using judicial authority with patience and I've applauded that on other occasions. But we're not now there. We're not now allowed so much rope for the city in my opinion.

I want to say a few words about the government's position because I think it needs saying. In Yonkers as in every other municipality on the federal level power is what counts. Who wields the power to make decisons? That's what matters. To say that depriving people who have stalled something because they've had the power to stall it, depriving them of that by creating structural change is not to impose strong sanctions is entirely paradoxical. It is, as the court noted, the strongest sanction. The only question from my point of view legally is whether the court has to take the other steps before setting up the commission, and I've cited cases which I believe show it does not nor does it have to find the city in civil contempt though it certainly could. It needn't as Judge Carrity noted take such measures when they will be counterproductive. And that has been my point for a year and a half on the issue of sanctions and jail. We don't need to pay attention to Henry Spallone. His position on these issues—I assume they're based on principle—have (134) been overruled by this court. He can continue his opposition. He can continue to speak against the proposals. I'm sure he will and as an American citizen he has a right to do it. The same is true of Mr. Odom. The fact of the matter is that these people cannot continue to interpose delays. That is beyond the scope of their ability and it ought to be. But

that is precisely what we let them do when we say we're going to have a process and in a week you either pass it or we'll have a hearing. Maybe we'll do something else, but from the history of this case we probably won't, so I think the fact is we have a very critical choice to make.

Obviously I'm pleased that the court is not squelching entirely the view of having a commission, but I feel the spectacle that will be created will be a distraction. It is irrelevant. If it were relevant to telling us that there will be future compliance with the nitty-gritty day to day implementation it would be something, but it's not. To get the implementation you need people who are committed to doing it. And frankly as long as those in Yonkers in administrative positions are controlled budgetarily in terms of their career ladder by the Yonkers city council and they indelibly are, we can't assure that. And I don't believe that the minority communities should see the long-term plan sabotaged. After (135) they pass the resolution, then they have control of it, than they sabotage, then we're back. I don't think we need to see that. We have every indication from their action that they will not perform in good faith. And I respectfully disagree as I said and I urge the court to reconsider.

The Court: Mr. Sculnick.

Mr. Sculnick: Very briefly, your Honor, addressing the specific proposal made this morning for in a sense going down both routes, as to the first route the proposed order submitted by the government in the context of this case, I think the city's position is that imposing fines or the threat of fines and imprisonment would be more punitive than remedial. In some respects some of the arguments made by the NAACP but I think from a different perspective—

The Court: Then you have an obligation. If you say that, then you have an obligation to affirmatively endorse some other proposal. You oppose both the contempt and the commission, and that really does not provide very much guidance to the court.

Mr. Sculnick: I think the city does oppose both. I think that's correct and I appreciate your position. But the reason the city opposes both is that in the first instance the threats of con-

tempt and fines are not remedial and in the second instance the suggestion of the (136) commission—as I stated in our paper the city council is obviously not in a position to consent to such a commission since it would be divesting important legislative functions, and the case law simply does not support in our view the wresting away of legislative functions as opposed to purely administrative functions.

The Court: Mr. Heffernan.

Mr. Heffernan: Your Honor, if you will indulge me for a few minutes I feel compelled to respond to what Michael just said. The government and the NAACP have a basic disagreement here. We have a basic disagreement going towards the same end. The city basically doesn't want contempt sanctions, the commission. They hope the case will go away. It's not going to. We believe, your Honor, it's somewhat naive to think that even with the creation of the commission city council, city officials are somehow going to be removed from the pervasive link of persuasion and influence which to date has stymied the remedial process in this case. Quite the opposite. We believe that failure of this court to move forcefully right now to take action to make sure that its orders are obeyed will only strengthen the opposition, the obstruction, and will basically allow city officials to continue to openly enflame community opposition. It's easy to say that the city council—let them yell and scream, say what they want, you know words (137) aren't going to hurt you. But here, your Honor, the words of language, Henry Spallone or Nick Longo, are more than words. They're rallying cries. They're a call for defiance. And that's why we believe the contempt sanctions here are very, very important to continue the remedial progress in this case.

Mr. Sussman: Your Honor, can I respond to that very briefly?

The Court: Okay.

Mr. Sussman: One is that the post-order of the NAACP provides on page 5 section 6(a) personal sanctions for persons either who do not comply, city agents or employees who do not comply with requests from the executive director and additionally for anyone who interferes with the discharge of the

YAHC's duties, and I don't think it is fair to say that we would simply blink at that in that context. We would not.

The Court: I have some other problems with the NAACP's proposed order. There's no provision for appeal to the court. I have problems with a one-year moratorium on relief from the commission. But I don't think it's necessary to go into them. I'm still of the opinion that in a given set of circumstances the commission is not only the appropriate route but the only meaningful route to take. As I listened to you both I'm reminded of what is probably the (138) oldest joke in the legal profession about the judge who listens to one side and says you're right, and then listens to the other side and then says you're right. Because I think there is great strength in the views that you have each expressed. You disagree as to which are the most compelling sanctions. And my response is that we will use any and all appropriate means to implement the housing law.

Our object is not to establish abstract principles of law. Our object is not to create political martyrs or heroes. Our object is to get the housing bill. You're quite correct, Mr. Sussman, that if there is a begrudging adoption of the housing ordinance and then a practice in and pattern of frustrating implementation that is something which the court will have to address, and certainly the first directive that will go to the executive director of the office of fair housing implementation will be to alert the court at the very first sign of any such action.

In many respects the difference between the two views on the calendar may be expressed as a difference between this week and a week from now. I think there need be no concern on the part of the class on whose behalf this action was brought as to the firm commitment of this court to implementing the housing remedy ordinance. I've said on many occasions that if federal civil rights remedial orders (139) can be defeated by local political hostility we no longer live in a government of law. I do not waver from that view. The difference becomes a question of timing. This court will sign the proposed order submitted by the Department of Justice. That order provides in paragraph 1 that the city of Yonkers is ordered to enact on or before August 1, 1988—that's next Monday, that's not some vague period in the future, that's next Monday—the legislative package relating

to the long-term plan as described in section 17 of the first remedial consent decree in equity which is of course Court Exhibit A. In the event that Yonkers fails to enact that provision on or about August 1 at 10:00 a.m. on August 2 we will hold a hearing as to why it should not be held in contempt.

I agree with you, Mr. Sussman—you were agreeing with my earlier comment—that Yonkers is already in contempt. I cannot quarrel with the obvious intent and purpose of this order and of the Department of Justice given the law with respect to contempt to comply—

Mr. Sussman: I agree with that.

The Court: Very well. The sanctions with respect to contempt are the fines which we have previously talked about which by shorthand we have referred to as the bankrupting fines, because they would indeed bankrupt the city of Yonkers in a very short period of time. I want to (140) reiterate the fact that those fines are paid into the treasury of the United States. They are not put into an escrow fund. They are not subject to return. It would take an act of Congress to restore to Yonkers those fines. These are not fines such as occasionally are imposed in a labor dispute where everyone knows that once the strike is settled the first thing that happens is the fines are returned. If anyone has any doubt as to the power of the court to impose such fines I respectfully direct your attention to United States v. Marc Rich.

I advise the parties—and I note the presence in the court not only of outside counsel for Yonkers but of the corporation counsel—that it is the court's intention in addition to the specific sanctions set forth in the order which I am now signing to consider the promulgation of a commission. The precise membership of that commission and other provisions with respect to it, I think, require some further thought and analysis. But the road to implementing the housing remedy orders is going to be a direct and expeditious road and it would be foolhardy for anyone to think otherwise.

Let me just announce that there will be a conference on August 4 at 2:00 o'clock with respect to the school board and the pending matters relating to the school board's motion.

(141) Mr. Sculnick: Your Honor, I just wanted to clarify that the order that's been signed contains—that is the exact proposed order that was submitted by the justice department—in other words, it contains notice not only to the city as a corporate entity but also to the city council members in their individual representative capacities that failure to adopt Court Exhibit A will result in potential fines and imprisonment.

The Court: It is the order exactly as submitted together with the document headed comments of the United States filed with the court on July 25, 1988. Anything further?

Mr. Sussman: Yes, I'd like to make as exhibits to today's proceedings two letters. One is a letter that I wrote to Mr. Pickelle, on July 20, 1988, inquiring as to the status of the four privately held parcels with respect to the eminent domain proceedings. I have a copy of that. And the second is a letter from Mr. Pickelle to me, of July 21, 1988, in which he reports as to the status, which I think is relevant for the record.

The Court: Very well. They'll be marked NAACP's Exhibits A and B of this date.

Mr. Sussman: And deemed part of the record for any appeals as may be necessary.

The Court: And deemed part of the record in this (142) case. I have a number of matters on my calendar next week. I will set them all aside if need be. Every participant in this case must either be available next week or have a representative present. We are in all senses in what I regard as an emergency situation, and it is to be treated as such. Anything further? Thank you.

EXHIBIT O—Transcript Dated September 2, 1988.

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

September 2, 1988
2:05 p.m.

THE COURT: As I suppose we are by now all aware, at approximately 11:55 last evening the Supreme Court denied the application for stay of the city of Yonkers and granted the application for stay of the four individual city councilmen, pending the timely filing and disposition of petitions for writs of certiorari.

At 12:36 p.m. today, the Court of Appeals for the Second Circuit issued its mandate and order. If I am correct in believing that that has not been made available to counsel, I will read the crucial paragraph of that order. This is the Court of Appeals for the Second Circuit. The order is signed by Judges Newman, Miner and Mahoney. After reciting the procedural history and the action of the Supreme Court, the order provides:

"Our opinion of August 6, 1988, adjudicating appeals by the city and the council members from the (2) district court orders of August 2 imposing civil contempt sanctions, had directed that the mandate of our court would issue on September 2 unless stayed by the Supreme Court. The Supreme Court has not stayed the issuance of our mandate and accordingly we direct that the mandate issue forthwith, thereby removing any question as to the jurisdiction of the district court. However, in light of the Supreme Court's orders of September 1 with respect to the four council members, we direct the district court to stay the execution and enforcement of the mandate of this court, insofar as that mandate directs action to be taken with respect to council members Spallone, Chema, Fagan and Longo."

The order continues:

"The result is that the daily fines against the city of Yonkers imposed by the district court in its order of August 2, as modified by our opinion of August 26, resume as of today, and the daily fines and impending incarceration imposed upon council members Spallone, Chema, Fagan and Longo are stayed pending the timely filing and disposition by the Supreme Court of petitions for certiorari in accordance with the Supreme Court's order of September 1."

The status therefore is quite clear: Pursuant to the opinions of the Court of Appeals, the Supreme Court and the order and mandate of the Court of Appeals which I have just read, the daily fines imposed upon the city of Yonkers (3) resume as of today and double daily through September 9, at which time they will reach their maximum level of $1 million per day. The consequences of that is, Monday being an official court holiday, the fine payable on Tuesday, September 6, will be in the amount of $192,000, being the total of the following daily fines: today, Friday, the eighth day, the fine schedule is $12,800; Saturday, day nine, $25,600; Sunday, day 10, $51,200; Monday, day 11, $102,400—a total of $192,000 payable on Tuesday.

As previously discussed, the court will sign two orders which had been submitted to it, the signing of which had been held in abeyance because of questions which had been raised, properly

raised, concerning this court's jurisdiction. The Second Circuit has now made crystal clear that this court now has jurisdiction over the matter.

The two orders which I am signing now relate to the funding of the Board of Education and with respect to the obligations to the bondholders. They are in the form discussed at our last conference. I am giving them to the clerk now, with the direction that they be filed and docketed forthwith.

Pursuant to the order relating to the Department of Education funding then, the $192,000 will be payable in two checks, one in the amount of $106,752, which will be treated in the manner provided in the court's order of July (4) 26, and the second check in the amount of $85,248, which will be held in the manner provided in the order just signed, dealing with the funding of the Board of Education.

Does anybody have any questions or any doubts with respect to any of the arithmetic or any of the matters which I have just stated?

On July 26, this court had before it two proposals. The proposal which was adopted and which is embodied in the July 26 order is one which we referred to as classic contempt. That is the garden variety treatment for contempt of an order of a court by means of fines and potential incarceration.

This court also made reference at that time to another proposal, the creation of a Yonkers affordable housing commission, and indeed the court had made available to the parties for their consideration and comment a draft of such a proposal. The NAACP thereafter also submitted a proposal relating to a commission.

When the matter was brought before this court, the city of Yonkers opposed the concept of a commission, although it appears from the opinion of the Court of Appeals and the opinion of Justice Marshall, who together with Justice Brennan dissented from the grant of the stay, that at the appellate level the city took the position that the commission route was a viable alternative to the classic (5) contempt route.

In promulgating the July 26 classic contempt order, this court advised the parties that it did not regard the two pro-

posals as being mutually exclusive, but rather that they should be regarded as possibly sequential steps to be taken.

What we said in part, at page 10 of the transcript of July 26, is if this, that is, the fine route, goes on for a period of time, "we are not just going to permit everything in Yonkers to go down the drain, because there is still one thing which is available to us, and that is, of course, the commission route."

The action taken by the Supreme Court late yesterday evening does not in any way alleviate—indeed one might argue it intensifies—the fiscal crisis which confronts the city of Yonkers. Although the four city councilmen have been granted a respite as to the sanctions which may be visited upon them personally, they of course still have a responsibility to the citizens they represent, who will bear the brunt of these fines, which, as I have already noted, will reach the level of $1 million a day in one week, the imposition and collection of which is the result not only of action by this court but the unanimous action of the judges of the Court of Appeals for the Second Circuit and of the Supreme Court of the United States.

(6) We will meet immediately after these proceedings with counsel for the parties, to explore with them informally some thoughts that we have with respect to possible solutions of this crisis and to hear from them any thoughts that they may have on that subject.

It should be clear that the first step that must be taken is compliance with the law.

Unless there is something else that anyone wishes to say, we will adjourn these proceedings and I will confer with counsel in the jury room.

MR. SUSSMAN: One matter, your Honor. Miss Hill, the new executive director of the office of implementation, did contact me a few days ago regarding the preparation of an order preserving the integrity budgetarily of her operation. Unfortunately, I have not yet had an opportunity to prepare the order. I will have it to the court on Tuesday. I apologize to the court.

MR. MERCAROLA: Counsel to Councilman Spallone. May I inquire whether a stay would be necessary with regard to the stay of contempt with regard to Councilman Spallone?

THE COURT: No. I think the orders of the Supreme Court and the mandate and order of the Second Circuit which I have just read are self-executing. No further document is needed for that purpose.

MR. MARCAROLA: Your Honor, then, with regard to (7) your invitation to meet with you, that would extend only to the parties and not to the councilmen?

THE COURT: Do you wish to be present?

MR. MERCAROLA: No.

THE COURT: I am not directing that you be present. If you do not wish to be present, you need not attend.

MR. MERCAROLA: This is new. May I consult with my client?

THE COURT: Certainly.

Mr. Sculnick.

MR. SCULNICK: Your Honor, on behalf of the city and in anticipation of the invitation you have just extended to all parties to discuss the crisis facing the city, I would move on the city's behalf that the court enter a stay of the fines as against the city during the period of time that we seek to resolve the matter through negotiations.

THE COURT: Application denied.

Let me say this, and it was one of the reasons I did all of the arithmetic and the timetable: If between now and Tuesday, when the $192,000 is due and payable, I am satisfied that we have reached a point which makes it appropriate that the fines be suspended or the payment stayed, you may renew that application, but not until that time, and certainly not until a time when there is a binding (8) commitment to comply with the orders of the court.

We are adjourned then *sine die*.

EXHIBIT P—The Affordable Housing Ordinance.

AGENDA

CITY COUNCIL OF THE CITY OF YONKERS
STATED MEETING
FRIDAY, SEPTEMBER 9, 1988

GENERAL ORDINANCE

G.O. NO. 13-1988

BY MAYOR WASICSKO

NO. 1

A GENERAL ORDINANCE AMENDING G.O.#24-1968, (COMMONLY KNOWN AS THE ZONING ORDINANCE OF THE CITY OF YONKERS) AND ADDING A NEW ARTICLE XV ENTITLED "AFFORDABLE HOUSING ORDINANCE OF THE CITY OF YONKERS".

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 TO 2
VICE MAYOR SPALLONE AND COUNCILMEMBER FAGAN VOTING NO.

Article I—General

1. Title

This Chapter shall be known as the "Affordable Housing Ordinance" of the City of Yonkers.

2. Declaration of Purpose

This Affordable Housing Ordinance is adopted to comply with the Long Term Housing Plan Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Educa-*

tion, et. al., and in furtherance of the following related and more specific purposes:

a. To implement a program whereby all new multi-family housing developments in East and Northwest Yonkers will be required to provide assisted housing units not to exceed 20% of the maximum aggregate number of units authorized for construction in exchange for a variety of zoning and other mandated incentives as set forth in Section 8 of the Long Term Housing Plan.*

---

*The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

—Increase the maximum permitted Height of a Building.

—Increase the maximum permitted Floor Area Ratio of a Building.

—Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor area ratios for mixed use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

—Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

—Reduce the minimum permitted Lot Area per family.

—Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

—Grant the owner of multi-family rental housing a full tax abatement on city real estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development, including both assisted and non-assisted units.

—Vary the extent and/or duration of tax abatement depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group as described herein.

—Grant a tax abatement on City real estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

—Vary the extent and/or duration of the tax abatement granted to households buying assisted units, depending on the household's income level.

(Footnote continued on following page)

b. To provide for the construction of housing units for rental or sale that will be affordable to households earning between 50% and 120% of the New York Metropolitan Area median income.

c. To provide for charges in existing zoning requirements and increase in a land use densities so as to facilitate construction of multi-family residential buildings containing a mix of market rate and assisted units.

d To provide for a variety in the size of assisted units.

e. To specifically target the areas of East and Northwest Yonkers for the development of assisted housing.

f. To promote the provision of assisted housing in a dispersed manner so as to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers.

(Footnote continued.)

—Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

—Cause funds in the Affordable Housing Trust Fund (AHTF) to be applied (subject to HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

—Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

—Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

—Vary the extent of assisted financing from the Industrial Development Authority depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group as described herein.

g. To provide measures to ensure that assisted housing units remain affordable for specified periods of time as required by the Long Term Housing Plan.

h. To foster to the extent possible the use of such architectural and design devices as will minimize the visual impact of such inclusionary housing developments on the surrounding community and any distinction between assisted and market-rate units.

3. Effectiveness of Ordinance

This ordinance shall be in effect from the date of enactment to such time as the goal of 800 assisted units have been produced in accordance with Section 15 of the First Remedial Consent Decree in Equity entered by the United States District Court for the Southern District of New York on January 28, 1988.

Article II—Definitions

4. Definitions of terms

As used in this chapter, the following terms shall have the meaning indicated:

ASSISTED UNIT—a dwelling unit which has been made affordable to a specified income group as defined herein, and for which afordability controls as defined in Article V shall apply.

DWELLING UNIT—a room or group of rooms intended for occupancy as separate living quarters, with cooking, sleeping and sanitary facilities for the exclusive use of a single household.

FIRST REMEDIAL CONSENT DEGREE IN EQUITY—order entered on January 28, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v. Yonkers Board of Education, et. al.*, which sets forth certain agreements of the parties to that

litigation, and certain actions which the City of Yonkers is required to take in connection with the consensual implementation of Parts IV and VI of the Housing Remedy Order.

HOUSING REMEDY ORDER—order entered on May 26, 1986 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Education, et. al.*

INCLUSIONARY DEVELOPMENT—a multi-family housing project in which a proportion of the dwelling units are assisted units.

LONG TERM HOUSING PLAN—Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Education, et. al.*, which set forth certain actions to be taken by the City of Yonkers required by Section VI of the Court's May 26, 1986 Housing Remedy Order.

MULTIFAMILY DEVELOPMENT—one or more residential buildings, each containing three or more attached dwelling units. Multifamily developments shall include, but are not limited to, townhouses, garden apartments, flats, mid-rise apartment buildings, and high rise apartment buildings.

OFFICE OF IMPLEMENTATION—Office created by the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v. Yonkers Board of Education, et. al.* to monitor and insure implementation of the Housing Remedy Order, with responsibilities and functions as enumerated therein and as set forth as follows:

—To work with developers in determining the incentives they require to provide assisted units at the sale or rental levels set by this ordinance based on an examination of project costs, projected sales or rental receipts, pro formas, etc.

—To ensure that construction of the assisted units is taking place according to the phasing schedule set forth in this or-

dinance, and that market rate units are not being occupied in advance of the schedule.

—To review and approve proposed sales prices and rent levels of assisted units and to ensure that the actual sales prices and rentals advertised are consistent with the standards of this ordinance and alternatively, to determine the sales prices and rentals to be applied.

—To review, and act upon, requests by developers for changes in sales prices or rent levels of assisted units, resulting from changes in income levels, mortgage interest rates, etc.

—To review and approve the proposed marketing plans for assisted units and to ensure that marketing provisions of this ordinance are fully and effectively carried out.

—To review and approve of procedures to be used in the screening of prospective tenants or buyers of assisted units to ensure that only households meeting the prescribed income qualifications are processed for occupancy of the assisted units.

—To ensure that closing or other ancillary costs for assisted units are consistent with this ordinance.

—To review and approve selection priorities for assisted units and to ensure that the established priorities in selection of tenants or buyers of assisted units are respected.

Article III—Districts; Applicability

5. Districts; Provisional Districts; Boundary Locations

a. Districts

This ordinance constitutes an overlay district to the M, MG, B, A and BA zones and such other zones in which multifamily housing is or may be permitted in East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use. This ordinance shall apply to multifamily housing, including projects (whether or not presently in the planning stage) which will require zoning changes, variances, special exceptions,

or other discretionary approvals from the City to begin construction, as of the date of this ordinance.

In addition, the Long Term Housing Plan Order specifically permits developers to apply for zoning changes to build multifamily inclusionary developments in any district in East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein.

b. Provisional Districts. A developer may propose to build a multifamily inclusionary development in the M, MG, B, A and BA zones in areas other than East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use; however nothing contained herein shall require developers in such areas to build multifamily inclusionary developments. Developers may also apply for zoning changes to build multifamily inclusionary developments in areas other than East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein so as to make the provision of assisted housing units economically feasible.

The City shall have the option of granting the incentives enumerated and referred to herein to facilitate the provision of multifamily inclusionary development in areas other than East and Northwest Yonkers. These incentives may be made available for construction of up to 400 assisted units in such areas, for which the City shall be credited (toward its goal of 800 assisted units as set forth in Article I, Section 3 of this ordinance), with one unit of assisted housing for every two assisted housing units constructed up to a maximum credit of 200 units.

c. Boundary Locations. For purposes of this ordinance "Northwest and East Yonkers" shall include all land in Yonkers north and east of the area bounded by: Glenwood Avenue Extending east from the Hudson River to Father Finian Sullivan Drive; Father Finian Sullivan Drive north to Lake Avenue; Lake Avenue east to Saw Mill River Road; Saw Mill River Road south to Ashburton Avenue; Ashburton Avenue east and south to the Saw Mill River

Parkway; and the Saw Mill River Parkway to the City of Yonkers municipal boundary with the City of New York.

Article IV—Supplemental Regulations

6. Required Number and Distribution of Assisted Units in Inclusionary Developments.

a. Multifamily housing development shall be inclusionary developments containing a set-aside of assisted units equal to 20 percent of the maximum aggregate number of units authorized for construction in such developments, except as provided in paragraphs b and c.

b. In multifamily inclusionary developments in the A and BA zones, and in such other zones which presently permit a density of sixty (60) units per acre or more, the required set-aside of assisted units may be reduced, but no less than 10% of the maximum aggregate number of units authorized for construction in such development shall be set-aside as assisted units, provided that the maximum density bonus that will then be given to the developer shall not be in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of the 50 percent over the permitted zoning, the 20 percent set-aside shall apply.

c. Notwithstanding paragraphs (a) and (b), the City may exempt any multifamily housing development of fewer than ten units from inclusionary development; provided, however, that such exemption shall not be applied to circumvent the set-aside requirements set forth in paragraphs a and b of this section.

7. Income Distribution.

a. Multifamily inclusionary development shall be required to include an income distribution for assisted units to ensure that:

(1) 1/8 of the total number of assisted units be provided on terms affordable to families earning no more than 50% of the median income in the New York Metropolitan Area;

(2) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 80% of the median income in such Area;

(3) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 100% of the median income in such area; and

(4) 1/8 of the total number of assisted units be provided on terms affordable to families earning no more than 120% of the median income in such area.

Provided, however, that a developer may propose to modify the income distribution of assisted units set forth above subject to approval by the City.

b. Notwithstanding paragraph (a) of this secstion, if the aggregate minimum number of assisted units to be allocated to any of the four income groups is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

8. Bedroom Distribution. Multifamily Inclusionary Development shall provide the following bedroom distribution for the assisted units:

(a) the number of two-bedroom assisted units shall equal at least 60% of the total number of assisted units;

(b) the number of three-bedroom (or larger) assisted units shall equal at least 30% of the total number of assisted units;

(c) the number of one-bedroom assisted units may not exceed 10% of the total number of assisted units.

9. Affordability Criteria

a. Definition

The term "affordable", as used in this ordinance shall mean with respect to each income category described in this ordinance, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, including principal and interest payments, property taxes, homeowners association fees, maintenance or carrying costs, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

b. Term; Transfer Restrictions and Occupancy Criteria

(1) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 of the First Decree and Article IV, Section 7 of this ordinance as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants, and subletting and assignments shall be prohibited.

(2) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or re-

sold only to, and at a price affordable to, a household which is, at the time of the purchase, in the same group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit.

(3) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence. All tenants in place at the time initial notice of conversion is provided who meet the income qualifications set forth in Article IV, Section 7 of this ordinance (as at that time adjusted) shall be permitted to purchase their unit at an affordable price to them as defined herein.

(4) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree or divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the ex-

tent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in this paragraph (d) shall not toll the running of the thirty-year period referred to in subparagraph 2 hereof.

(5) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(6) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority in the following order to:

a) persons who, between January 1, 1971 and the date assisted housing is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Ordinance are made available. Occupancy

choice from among such persons applying shall be on a first-come, first-served basis;

b) residents of the City of Yonkers; and

c) persons employed in the City of Yonkers.

(7) The Office of Implementation (as defined in Article II, Section 4 of this ordinance) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such prescreened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Office of Implementation shall be responsible for monitoring the good faith application of any discretion vested in such owners or developer with respect to the choice of tenants or purchasers of assisted units.

10. Architectural Integration

Developers of multifamily inclusionary developments shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate housing. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit. Developers shall be encouraged to foster, to the extent feasible, the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

11. Staging

In all multifamily inclusionary developments, the following staging schedule shall apply for rental or sale units:

Percentage of Market Rate units Receiving Certificates of Occupancy	*Percentage of Assisted Units Receiving Certificates of Occupancy*
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

Certificates of occupancy shall be issued to market rate units when the required percentage of assisted units for the respective stage has been completed.

Article V

Zoning Regulations; Incentives

12. Applicability

The zoning regulations for multifamily inclusionary developments shall allow for departures from the provisions of Table 107-7 of the City of Yonkers Zoning Ordinance.

13. Zoning Regulations

To promote the goals of this ordinance, and specifically to make the provision of assisted housing setasides feasible within inclusionary developments, the City shall offer incentives to developers of multifamily inclusionary developments which may include, but are not limited to, the following departures from underlying zoning:

a. Increase of the Maximum Permitted Height of a Building.

b. Increase of the Maximum Permitted Floor Area Ratio of a Building.

c. Change of the formulas set forth in Section 107-55 (B) of the Yonkers Zoning Ordinance for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

d. Reduction of the Minimum Permitted Lot Width or Lot Area for apartment houses.

e. Reduction of the Minimum Permitted Lot Area per Family.

f. Reduction of the Minimum Permitted Rear Yard or Minimum Permitted Front Yard.

Notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Zoning Ordinance, a particular housing development may contain units in excess of the number which would otherwise have been allowed by such Chapter.

Departures from underlying zoning regulations for multifamily inclusionary developments shall be determined based on submissions made by the developer as provided in Article VI, Section 14 of this ordinance taking into consideration such factors as, but not limited to: the provisions of the underlying zoning, including but not limited to height, bulk and density; the impact of development on surrounding land uses and neighborhoods; the allocation to specific income groups of assisted units which the developer (subject to specific provisions of this ordinance) elects to make; the degree to which assisted financing/grants of mandated incentives (as set forth in Section 8 of the Long Term Housing Plan) are available; prevailing economic and housing-market conditions; and allowance for a reasonable profit margin.

Article VI— Expedited Review; Organizational Structure

14. Expedited Review; Submission

a. Expedited Review. The City shall establish an expedited review process for multifamily inclusionary housing projects pursuant to this ordinance to include priority scheduling and expedited review and negotiation.

b. Pre-Submission Review by Office of Implementation

Developers of multifamily inclusionary projects are encouraged to seek the assistance of the Office of Implementation in preparing conceptual development plan submissions as set forth in paragraph (c) below. The Office of Implementation shall work with developers in determining the types of zoning and other incentives required to make the provision of assisted housing set-asides feasible within inclusionary developments, and is specifically empowered to make recommendations to the City as to the need for any mandated incentive not expressly set forth in Article V, Section 13 of this ordinance, including tax abatement, waiver of applications and/or processing fees for building approvals, use of Affordable Housing Trust Funds, and/or use of financial assistance from the Industrial Development Authority.

Developers of multifamily inclusionary projects intending to make application to the City for tax abatement, waiver of application and/or processing fees for building approvals, funding from the Affordable Housing Trust Fund and/or financial assistance from the Industrial Development Authority are required as part of the pre-submission review process to obtain recommendations from the Office of Implementation concerning the granting of such assistance before making application to the City Council, as set forth below. The Office of Implementation's recommendations shall be for-

warded to the Yonkers Planning Board and Yonkers City Council.

c. Submission/Development Review/Approval

(1) After having sought the assistance and recommendations of the Office of Implementation as outlined in paragraph (b) above, developers of multi-family inclusionary projects shall submit to the Yonkers Planning Board a conceptual development plan, which shall contain the following information:

(a) General location of existing and proposed structures, including the location of the assisted housing units.

(b) General type of existing and proposed uses, including a description of the proposed bedroom and income distributions, and proposed tenure structure of the assisted housing units.

(c) Conceptual rendering of the exterior design treatment of the building(s) and a typical floor plan, including a floor plan showing where the assisted units will be located.

(d) A completed Environmental Assessment Form (EAF).

(e) Existing topography and soils information, and general grading and drainage proposals.

(f) A map delineating those areas on the site comprising floodplains, wetlands, lakes, ponds, streams and other surface water bodies, and areas with slopes in excess of 15%, and a statement as to what, if any, disturbances are

contemplated in these areas, and the extent to which any mitigation measures are proposed.

(g) Existing and proposed internal streets, driveways, and points of access to existing mapped streets.

(h) Parking and loading areas, showing size and location of stalls and aisles.

(i) Landscaped areas and proposed screening.

(j) A written statement and supporting documentation indicating the traffic impacts of the project on the adjoining roadway network, and what, if any, off-site traffic improvements are proposed.

(k) A written statement and supporting documentation indicating whether any land or buildings listed on the State or National Registers of Historic Preservation will be altered and describing the nature of the proposed alterations.

(l) A statement and supporting documentations as to the capacities of existing water and sewer lines and related facilities, and that such water and sewer lines are adequate; if not adequate, proposed improvements that are required.

(m) A statement and supporting documentation as to the capacities of existing gas and electric lines and related facilities, and that such gas and electric lines are adequate; if not adequate, proposed improvements that are required.

(n) Existing and proposed location and type of major signs and lighting.

(o) A written and graphic description of various aspects of the conceptual development plan, including any proposed phasing of development activities, and a statement of the applicant's interest in the land as well as evidence to support the applicant's right to make the application and use the land.

(p) A written statement indicating which, if any, sources of municipal assistance or funding (*e.g.*, tax abatements, financing, grants) the applicant seeks to use and specifying the type of assistance, if any, that will be sought from the County, State of Federal governments.

(q) A written statement describing the types of incentives that the applicant considers necessary and sufficient to make the provision of the assisted housing set-aside economically and socially feasible, and the specific provisions of the underlying zoning from whch the applicant is requesting departure as set forth in Article V, Section 13 of this Ordinance.

(r) A written statement and supporting documentation describing the reasons for the required departures from the underlying zoning, including but not limited to: a financial pro forma showing likely profit margins with and without the departures being requested.

(s) A written statement and supporting documentation indicating the manner in which the applicant intends to administer the assisted units in compliance with Article IV, Section 9 of

this ordinance, including sales prices and/or rent levels for the assisted units.

(t) A written and graphic description of the area within a 400 foot radius from the property and statement and supporting documentation as to the impacts that the project will have on such area.

(u) A written statement and supporting documentation projecting the additional number of school-age children generated from both the market rate and assisted units and their impact on the existing school system. The developer shall simultaneously transmit such written statement and supporting documentation.

(2) The Planning Board through the Planning Director shall have fifteen (15) working days to request additional information from the applicant, otherwise the conceptual development plan shall be deemed complete. The Planning Board shall then have forty-five (45) working days from the date on which the conceptual development plan is deemed complete to act upon the application, otherwise the application shall be deemed approved. The building regulations contained in the conceptual plan shall be deemed permitted only in the manner stipulated by the Yonkers Planning Board in its approval. Any material or substantial amendment or amendments to the conceptual plan must be submitted to the Yonkers Planning Board for approval in the same manner as the original plan.

(3) Upon approval of the conceptual development plan by the Yonkers Planning Board, as set forth in Subsection (2) above, the developer may elect to make application to the Yonkers City Council for any other incentives considered necessary to effec-

tuate the multifamily inclusionary development as proposed (but not expressly set forth in Article V, Section 13 of this Ordinance), including tax abatement, waiver of application and/or processing fees for building approvals, funding from Affordable Housing Trust Funds, and/or financial assistance from the Industrial Development Authority. Upon receipt of such applications, the City Council shall have 30 days to act upon the request.

Developers applying for such incentives shall submit to the Yonkers City Council the complete conceptual development plan as submitted to and approved by the Planning Board.

(4) Developers of multifamily inclusionary projects shall include in the application for building permits a site plan containing the following:

(a) Property lines and related street, right-of-way and easement lines as determined by survey.

(b) Location of existing and/or proposed buildings and structures and uses, including the location of the assisted units.

(c) Layout of existing and proposed off-street parking areas showing the details of aisles, driveways and each parking space.

(d) Existing topography of the site and immediately adjacent property as revealed by contours or key elevations as may be required by the City Engineer, and any proposed regrading of the site.

(e) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

(f) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

The Director of the Bureau of Housing and Buildings shall forward one (1) copy each of the site plan and accompanying documentation to the Planning Director who shall insure consistency between the site plan and the approved conceptual development plan before issuance of a building permit.

No building permits shall be issued for any such building, structure or use until the Director of the Bureau of Housing and Buildings has received a written assurance of consistency from the Planning Director, except that if said Director shall fail to report within fifteen (15) days, the proposed site plan shall be considered approved. The Planning Director's review of the site plan shall note any changes from the approved conceptual plan. The Director shall not approve any material or substantial changes to the approved conceptual plan which are not in accordance with the declaration of purpose of this ordinance; any such changes shall require approval of the Planning Board.

If the developer is required to make any material or substantial amendments to the site plan based upon the review of the Planning Director, the Director of the Bureau of Housing and Buildings shall forward again amendments to the Planning Director for re-approval prior to issuing any building permit for such amendment.

(5) If the developer does not file an application with the Director of the Bureau of Housing and Buildings and the Director of the Bureau of Housing and Buildings does not issue a building permit, within two (2) years after the Yonkers Planning Board's approval of a conceptual plan, then the

zoning governing the land delineated in the conceptual plan shall be voidable by the City, so as to permit the development of other multifamily inclusionary developments in Yonkers.

EXHIBIT Q—Transcript of Hearing Dated September 14, 1988.

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

80 Civ 6761 LBS

Defendants.

September 14, 1988
10:15 a.m.

THE COURT: Are counsel present in United States v. Yonkers?

MR. SUSSMAN: Yes, your Honor.

THE COURT: By letter dated September 12, 1988, there was forwarded to the court a copy of a resolution of the City Council of Yonkers dated September 9, 1988, adopting, without condition or qualification, general ordinance number 13-1988, commonly known as the affordable housing ordinance of the City of Yonkers. This satisfies the terms of the court's order of July 26, 1988, and Yonkers has thereby purged itself of its contempt.

As the court indicated in telephone conversations with the parties on September 9th, we were able to intercept the deposit

into the United States treasury and the special (2) account of the $819,200 paid by Yonkers on September 9th for fines incurred on September 8th. Does anyone object to the return to the City of Yonkers of the two checks totaling $819,200?

MR. HEFFERNAN:No, your Honor.

MR. SUSSMAN: No, your Honor.

THE COURT: Mr. Keneally, will you deliver to Mr. Pickelle the two checks.

The previous deposits have been deposited into the United States treasury and the special account for the board of education. The sums paid to the United States treasury are not refundable, by act of this court.

For the past several weeks this litigation has presented an issue which, as the court noted on several occasions, far transcends the City of Yonkers and far transcends the particular orders in question. At issue was the fundamental question of whether a community could refuse to comply with lawful federal court orders to implement a remedy for long-standing violations of civil rights. We hope that issue has been laid to rest and that we will no longer have to deal with a housing remedy order in terms of confrontation, court power, contempt proceedings. The hope is that we can proceed on a more constructive track.

It may be appropriate, however, to remind the parties of the second paragraph of the finding of contempt (3) order dated August 2, 1988. That paragraph reads, "If at some later point the city purges itself of contempt and then resumes its contumacious acts, the level of fines to be imposed for such contempt shall begin at the level at which the fines had previously ceased."

Also forwarded to the court by Mr. Pickelle were two additional resolutions adopted by the city council on September 9th. One of these advises that the council "intends, with the permission and consent of the court, to amend the affordable housing ordinance.. As the parties were advised on prior occasions, if the city or, indeed, if any party wishes to submit a proposed amendment to the affordable housing ordinance, it should do so in writing and promptly so that all parties can examine carefully and comment on the proposed amendment.

We do, however, want to move forward with as much speed as the circumstances will permit. This case is eight years old. There is not a single resident of Yonkers who is a member of the plaintiffs' class, that is, the class on whose behalf the suit was brought, whose housing opportunities have in fact been increased by virtue of this litigation. I mention that fact and that concern because it is a significant factor in matters which we will continue to discuss and consider.

May have proposed amendment to the (4) affordable housing plan, in writing, by close of business on Friday, September 23rd. May we have comments with respect to the proposed amendment by the close of business on September 30th.

Another resolution forwarded by Mr. Pickelle and adopted by the Yonkers City Council on September 9th, resolution number 193-1988, speaks of modification of the prior orders of this court with respect to the 200 units of public housing. The court's position with respect to any such modifications has been clear and consistent. We stated on August 5th and, I believe, on at least two occasions thereafter, that the court would continue to welcome any proposals the City of Yonkers wishes to advance that would have the support of its residents and of the parties and that would provide the housing needed to remedy the

long-standing civil rights violation. We will consider carefully all proposals which meet these criteria. At the same time, we will, of course, move ahead with the existing plan pursuant to the timetable previously established, unless and until that plan is modified.

The court has received a great many expressions of concern from interested parties who are fearful that this court might modify the existing housing plan, that is, the plan embodied in the previous housing remedy order and in the consent decree, without having afforded them a full (5) opportunity to comment. There need be no such concern. For the reasons I have already referred to, that is, the long delays which have been experienced in furnishing any real relief or benefit to the plaintiff class, we will set relatively short periods of time for comments. We will set definite dates. We will not adopt any modifications

without having considered the views of all the parties and consulted with our housing expert Oscar Newman.

Let me digress for a moment and comment on the role of the outside housing adviser, Mr. Newman. Let me make clear that regardless of whatever roles he previously occupied, that is, occupied by virtue of having at one time been an expert retained by and consultant to the City of Yonkers, Mr. Newman's sole role at this time is as an adviser to the court. He will not discuss with the parties or others or with the media his views or the court's views as to any sites or any proposed modifications of the plan. His opinions will be given solely to the court, and the court will then determine whether and how those views are to be shared by the parties. I make this statement at Mr. Newman's request so that his role will be clarified and so that there be no confusion in that regard.

I have read the resolution and some of the changes which it proposes. I have a number of questions. I suppose the threshold question that I have is whether the (6) City of Yonkers, independently or jointly with the NAACP, has reached a point in its consideration of this matter in which it is prepared to make a specific proposal for the modification of the existing plan. Has that point arrived? Is there a specific suggestion or proposal?

MR. SCULNICK: Yes, your Honor, and Mr. Sussman is handing up to the court a document which embodies the recommendations for the improvements in the public housing portion as well as the long-term housing portion of the plans. These represent agreements reached between the city and the NAACP and items to be proposed to the court for approval.

THE COURT: As is obvious, this is a document which is being handed to me now. I am seeing it for the first time. Has this been distributed to the other parties?

MR. SCULNICK: This morning.

MR. HEFFERNAN: This morning, your Honor.

THE COURT: We will mark this as Court Exhibit A.

(Court Exhibit A was marked for identification)

MR. SUSSMAN: For one clarification on this, your Honor. It was my understanding, obviously mistaken, that the parties were going to meet with the court in chambers this morning,

and one purpose of the meeting would be to go over this document and discuss it and perhaps get it scheduled for consideration and other parties' comments. (7) That was why we were going to present it in that fashion this morning informally to the court.

THE COURT: My understanding is, because we have spent two years and every reasonable effort should be made not to have unnecessary delays, that this represents a proposal by the City of Yonkers which has the support of a majority of the members of the City Council of Yonkers and which represents a considered recommended change on the part of the city. Is that accurate?

MR. SCULNICK: That is correct, your Honor.

THE COURT: I will meet with the parties in chambers, but I would like to make some points and raise some questions. You may choose to answer the questions in open court or you may wish to defer responding until some later date. As I indicated, we will set a timetable.

Not having had the benefit of this document but just having had the benefit of the resolution, the questions which came to mind were with respect to the type of housing to be constructed and the recommendation of stand-alone townhousing units, whether there had been prepared or was being prepared any cost analysis or identification of funding sources. With respect to the St. Joseph's Seminary site, the parties need hardly be reminded of this court's strenuous efforts in open court and in conferences in March and again in May, seeking to get the City Council to either (8) designate an alternate site or authorize the court to do that. Does Court Exhibit A envision the substitution of a site for the St. Joseph's site?

MR. SUSSMAN: Yes, your Honor. As well as the Helena site, just so that is clear.

THE COURT: My understanding of the Austin site, apart from all other considerations with respect to that site, is that it is subject to a reversionary right on the part of the county. I will want to inquire whether there have been obtained assurances from the county that that reverter right will be relinquished.

Because we have heard in the past several days, and welcomed hearing in the past several days, assurances of goodwill and cooperation from various sources, might I suggest that some of those assurances may be meaningfully implemented. This might be an appropriate time for the City of Yonkers to request of the county a release of its right of reverter with respect to all of the land owned by the City of Yonkers not actually used for parkland to the extent to which such land would be used for purposes of implementing the housing remedy order? That is a very real contribution that the county could make which would greatly enhance the resources and the flexibility in dealing with all aspects of the housing situation.

Two other comments, and then I will hear from the (9) parties either in open court or in chambers if they wish.

There was reference in the resolution to the management of public housing units by a, quote, nonprofit organization on which will be represented a member of the clergy, unquote. My question is, to what extent does that require any action by the court or by HUD? Is this something which the Yonkers MHA may do on its own authority, that is, subcontract the management of particular housing units to a nonprofit entity? I don't know whether that requires HUD approval or does not require HUD approval. That is something I would like to be informed about.

The resolution says that within 30 days of the approval by the court of a modification of the consent decree, a consultant will be retained to study the management of existing public housing in Yonkers. I confess to be at a total loss to understand why such a study is linked or conditioned on a modification of the consent decree. Surely, that is something that Yonkers is free to do now without court approval or intervention or the approval or intervention of any of the parties.

What I would like to do is to set a timetable for a response by the Department of Justice, by HUD, by the school board, and the opportunity for comment by other interested groups in the community to Court Exhibit A. This involves one additional site

(10) MR. SCULNICK: Yes, your Honor.

THE COURT: Mr. Herald, the Austin Avenue site we are not hearing about now for the first time in this case. Has HUD done any study or analysis of the Austin Avenue site?

MR. HEROLD: I'm not sure, your Honor. I think it may have done what we called a preliminary evaluation of the site sometime in the past, but not a full preapproval review. It may be necessary to go out and look at the site again.

THE COURT: What I would like to do is set the end of this month as the time for all comments. I have very much in mind that it is at the end of this month that HUD will have completed its review of the pending requests for proposals on the existing plan, and so we will have before us the existing plan and HUD's comments on a request for proposal. We now have the city's recommendations, and we will have the comments of the other parties.

MR. HEROLD: If possible, your Honor, I would like to request that any HUD comment to this proposal not require any sort of additional review of the Austin Avenue site unless it is determined to go forward with that so that the individuals involved may devote their attention to reviewing the existing RFP.

THE COURT: I want to defer that. I want to make (11) two comments on that. Nothing, nothing, that has been said or that has transpired since the timetable was established with the court and the parties relating to the processing of the existing plan and the RFP alters that timetable.

Manpower is not to be diverted from that review or process.

With respect to the Austin site, I ask that you review your files and consult with the HUD personnel with respect to how much of a study has already been done of that site and advise the court whether, in your opinion, further inspections or analysis are appropriate. Surely, in an agency of the size and with the resources of HUD, if such further analysis is required, it should be possible to assign personnel to that task without interfering with the review of the existing RFP. HUD surely has more than one project under consideration at a time.

But it may all be moot. My impression is that Austin was the subject of considerable scrutiny previously.

We will get everyone's comments with respect to Court Exhibit A by September 30th. I will schedule a conference or a hearing promptly thereafter. I like to schedule hearings as early as possible so people may make plans. I realize that we have out of town counsel in the case. But I think it is very difficult to estimate now how long after September 30th would be appropriate to do the study and review.

(12) Mr. Heffernan?

MR. HEFFERNAN: Your Honor, I have a fairly basic question here. Counsel for the city has represented that this specific, I suppose we would call it, request for modification has been put forward by the city, namely, the majority of the City Council. I would like to know in what form that city approval has come, whether or not there has been a vote of the City Council on this specific propose. If not, I think it would be appropriate to have a council vote. Quite frankly, your Honor, I think we have been down this road before where if we don't have a City Council action on something, I don't think we have the city position on something.

THE COURT: Mr. Sculnick?

MR. SCULNICK: First, the two additional resolutions forwarded to the court reflect what the city believes to be a concurrence of the majority of the City Council for these specific changes, five members. Plus, I think we are in a position to represent that on the basis of our informal discussions and as a result of the discussions and negotiations that led up to preparing just such a document to be submitted to the court.

THE COURT: You have the benefit, as neither I nor Mr. Heffernan have had, of having compared Court ExhibitA with the resolution. Are you saying that it is your view (13) that Court Exhibit A implements the resolution?

MR. SCULNICK: I am not in a position to say they are identical, but certainly their intent is to be the same.

MR. HEFFERNAN: It is my understanding that the resolution was a nonbinding resolution. I don't know that they are exact copies. The Justice Department does not have its head buried in the sand. Based upon what we have been learning for the past several days, I think there is a serious question about whether there is City Council support for this plan. I don't

think it is unreasonable to ask for a vote on this. Frankly, if we don't have the council support on this plan, I think we are wasting our time and the judge's time and the parties time in responding to this.

MR. SCULNICK: May I respond, your Honor? THE COURT: Yes.

MR. SCULNICK: Your Honor is well aware that we have been reluctant to represent to the court that we have the agreement of the City Council without a good-faith basis for so believing. I think having another vote at this point is really a pointless act.

THE COURT: Why is it pointless? When for the first time was the Austin site the subject of this resolution? When did that reenter the consideration of the housing remedy?

MR. SCULNICK: In this most recent episode, last (14) week Wednesday, your Honor, a week ago Wednesday. Of course, it has been a familiar site for quite some time. But in this particular episode, just a week ago.

THE COURT: It seems to me that there is a virtue in Mr. Heffernan's suggestion which is more than the mere question of authority, and that is the extent to which there is, in fact, support in this plan. I have been deluged with letters from Canopy and from Park Hill Residents Association and from other groups decrying what appears to be a reversion to the concept of higher density, which was something which had been considered and set aside in preference for the lower density seven-site scattered housing. I really did not want and do not want at this time to get into a discussion of the merits of the proposal. But Mr. Heffernan is certainly right that it would be unfortunate if all the time and effort and emotion was directed toward this proposed amendment only to learn that it, in fact, did not have the broad support which was envisioned when I made the statement that we would welcome changes to the plan which had the support of the community and the parties.

I recognize that any plan is going to have its detractors, and there are many who think that it is simply a matter of "not in my backyard." What is the problem, now with the benefit of Court Exhibit A, of having the City (15) Council adopt a reso-

lution urging modification of the consent decree to embody the order?

MR. SCULNICK: I would appreciate the opportunity first to discuss some of these items in chambers. But I think basically the city's concern is that every time a City Council meeting is held on one proposal or another, you are going to draw a lot of debate both pro and con which tends to derail the positive movement toward a resolution which will, if the court please, be positive.

THE COURT: Let me put it this way. Assume, solely for the point of argument, that as a result of the discussions and the comments the court and the parties, other than the City of Yonkers, agree to a second consent decree which is, in whole or in significant part, in conformity with Court Exhibit A. Are you prepared, on the basis of the existing City Council resolution, to sign such an amended consent decree on behalf of the City of Yonkers?

MR. SCULNICK: Your Honor, I think that type of a hypothetical brings the negotiation process into the media, into the public, in a way that makes it very difficult to answer that truthfully. I think that the city has presented these—

THE COURT: Let me make another suggestion. Let's go forward with our timetable, that is, comments in two weeks, the end of the month. Understand that the court (16) will not entertain any amendment to the consent decree proposed by the City of Yonkers unless and until it has assurance that that proposed amendment is supported by a majority of the City Council. Otherwise, I think you would agree, we are really just spinning wheels.

MR. HEFFERNAN: Your Honor, I don't quite understand what you just said.

THE COURT: What I am saying is that I adhere to my direction to the parties to consider and comment on this proposal and to submit their responses. But the court will not, when it has all those comments—and I hope that the comments will be exchanged not only in writing to the court but informally among the parties—but the court will not amend a consent decree to substitute another decree which is said to be a proposal

by the City of Yonkers unless it has the assurance that that is, in fact, the case, which assurance is best furnished by a City Council resolution.

MR. HEFFERNAN: Your Honor, if I can object. Basically, what you are doing is you are telling the United States and HUD and the other parties to comment on something that we have no real assurance is going to be passed on the City Council.

THE COURT: That is exactly what I am doing. That means that there is going to have to be an expenditure of some time and effort on everyone's part in the next two (17) weeks, and it may all come to naught. It may be that much of what has happened in the past two years will all come to naught. I think that is in the nature of the process.

MR. HEFFERNAN: Your Honor, I just think—

THE COURT: Frankly, I think that is not a very heavy burden.

MR. HEFFERNAN: I think it just ignores past history of what the City Council has done in this case. I don't understand why the city cannot commit itself to something it has put forth today as its proposal.

THE COURT: I am prepared—Mr. Sussman will remind me of my perpetual unjustified optimism—to proceed upon the assumption that the City of Yonkers has indeed learned what one city councilman is quoted as having said was a very expensive civics lesson.

Mr. Sussman?

MR. SUSSMAN: Briefly, I do want to respond to some of the questions your Honor raised now and not in chambers, because given that that I were raised here I think, frankly, I would have to respond to them today in some form, and I think the court should hear the response directly.

First of all, let me just say one thing prefatory to that. I think it needs to be said very directly. In our meeting of two Fridays ago with this court, held off the (18) record but it was transcribed, the court indicated that compliance had to occur but that the court might consider or would consider on the merits suggestions to, quote, improve or better, closed quote, the plan.

In my own judgment, and I believe the judgment of the board of the NAACP, what Court Exhibit A represents is a joint effort by the NAACP and the city to produce such an outcome. It is not meant in disrespect in any regard to the court. The city did comply first. It was my constant position in discussions that compliance would have to occur.

THE COURT: Let me interrupt you because in no way, in no way, do I regard any proposals to modify the existing plan as being disrespect for the court. There is no pride of authorship in the consent decree plan. There is particularly no pride of authorship in the consent decree plan because the court is not the author of that plan.

MR. SUSSMAN: I understand that. But I do think that, unfortunately, and I am not suggesting the court has created the impression, but I think it has been created that there are those who are saying that by trying to sketch out with the city in the period of last week what might constitute, quote unquote, improvements and what might be acceptable to us as, quote unquote, improvements before compliance, we were somehow compromising the integrity of the process. I just don't believe that because I think it (19) should be clear on the record that at every meeting at every stage I insisted there be compliance before any presentation be made. I want that to be made for the record in light of matters stated by others which I am frankly trying not to respond to each matter.

THE COURT: It was my understanding and it was confirmed in that 5 p.m. telephone conversation on September 8th that it was the position. NAACP said that there would first have to be compliance. I also, while we are on that subject and relevant to your remarks, know that there was reference made in the media to the court's having refused to hear the substance of the proposed modifications. I want to make it clear that I did that not because I was resistant or adverse to any changes in the plan that would be generally regarded as improvements but because I wanted it to be clear beyond anyone's possible doubt that compliance had to be unconditional.

MR. SUSSMAN: Correct. That was certainly made clear. Frankly, I think the timing of that call and the court's statement was extraordinarily helpful in producing the resolution of

that evening. But I also think important to the resolution was an understanding by all involved in Yonkers that the court had stated the Friday previous that improvements were possible, without of course sketching any improvements or discussing them in any detail.

What you have before you as Court Exhibit A, and I am not going to go through it and try to defend it here today another day for that may arise, I hope is an effort by the NAACP and the city to provide that set of improvements which we believe has social virtue as well as practical virtue. I do want to respond specifically to the questions that your Honor raised.

The first had to do with cost issues.

THE COURT: My eye has just fallen on the paragraph in which it says that the city agrees to pay the difference.

MR. SUSSMAN: Yes. That related, your Honor, to conversations which had occurred, and I am sure these are at this point a matter of record, with regard to total development costs that HUD had made available or would make available within its administrative discretion and the possibility that those might not suffice to cover all costs. The city, through this document, has agreed to assume the additional costs on those four free-standing sites.

I want to make one other point on costs because I think it is important. In the course of our discussions, and I am sure the court is aware of this, the State of New York, through the governor directly and his counsel directly, have said to us that that I are willing to provide state assistance with respect to the affordable housing to (21) be built in Yonkers. That I have made no specific commitment, I want to make that clear. But it is my understanding that the governor may have further information on this available.

What we are proposing on the two mixed sites, just so it is clear, is some number of units of public housing, some number of units of affordable housing, which would of course go toward realization, in an expeditious way in my judgment, of the affordable housing goals, and some larger number of market-rate housing. It is our contemplation that the affordable housing to be built on those two sites would be built with

the contribution of the city as set forth in the long-term ordinance and the long-term plans. In other words, the inducements and incentives would be part and parcel to that and part of that process in terms of cost issues. I just thought that I would inform the court of that since there may be confusion as to it.

Your Honor also asked the question about marketing and ownership and, I believe, the running of the units and how that would work. It is my understanding that the MHA may request from HUD a dispensation or permission which would allow it to, in fact, contract for management services with a not-for-profit and, in fact, jointly, in a sense, manage the projects. We would hope that that would (22) be attempted in this situation.

Let me respond to the issue with respect to the west side of Yonkers, which the court raised. First of all, it is not the City of Yonkers which is requesting, as is included in Court Exhibit A, a study of the management and the city contribution to extant west side housing; it is the NAACP. We believe it does have a place here for the following reason. We do not believe that we can assure east Yonkers residents of the optimal management of public housing at the same time that we allow in place management which is widely perceived, whether fairly or unfairly and that is why we want this study to be done and then a commission of Yonkers residents to review the study and implementation of its representations. We do not believe we can allow that 2400 units of housing to be managed in a way which does not provide equity vis-a-vis the housing in east Yonkers. We can't simply focus on the housing in a white neighborhood on ensuring proper management, while allowing the—

THE COURT: You mean equity in the sense of fairness?

MR. SUSSMAN: That is correct. We must have, if we are going to focus on the 200 units, some focus to the extent of equity on the exant management. The MHA obviously would have every opportunity, when a consultant is employed (23) and then the three-person commission nominated by Mr. DeLuca

THE COURT: No, my point was not in any way to disparage there being such a study. My point was simply that that was something, it seems to me, which was entirely within the power of the City of Yonkers to do and did not require the court's approval or the approval of any of the parties.

MR. SUSSMAN: I am trying to explain to the court why it is a little more complex than that. The reason it is more complex is that the management of the 200 units is clearly an issue this court will focus on if it has not already. To set up a management there, if one wants to look at it this way, which optimizes the management of the units, while we are aware of the conditions or the claimed conditions in the west side, creates a situation which appears and in fact would be inequitable. I think you can't simply look at one and say the other the city can do on its own. We would not see as enforceable some agreement with the city in this consent decree in exchange for having management discretion in east Yonkers but not west Yonkers. We think that I are linked. not just politically but in terms of the individuals living on both sides of the city. I suggest to the court that it is, but we can leave until another day whether that is important or not.

Now I want to talk about timing. In all of their (24) discussions, discussions with Mr. Pickelle and Mr. DeLuca, those that Mr. Sculnick was involved with, and those were the primary parties to these discussions, one matter was clear. I don't think anyone will deny this or contradict it. That was that we recognize the need for expedition. We recognize that there is an RFP review process that is supposed to be consummated by the end of this month, and that this process has gone on for too long, that this process is socially destructive, as it has been. Our hope, frankly, was that quite quickly we would have guidance from HUD—and we understand the integralness and importance of HUD's role and are not trying in any way to overrule it—on several issues. One, the useability of Austin Avenue, not simply for public housing residence, but of course in the fashion we are speaking of, since I think that might change the equation somewhat and it is obviously relevant, and of course a view from HUD as to whether the mix that we have

proposed at Whitman and Austin would be within their range of tolerance, if I can use that word.

On that mix, the final comment is this. There had been a consensus between the United States and the NAACP in this case in 1986 and 1987 on the Whitman site that we should go with some mixed use. It may not be identical mixed use to the one now proposed, but there was a clear consideration of that and a concern that we not use a huge (25) site, 18 acres, for 48 units of housing. I understand the density concerns that have been raised by Canopy and other well-meaning people. But in terms of social utility, in terms of producing housing in an efficient manner, that is a very large site, and we think density can be respected on a site of that size with an accommodation of the units that we have been proposing.

I think that proposal should not be seen as coming out of the left field but rather is consistent with a long line of thought in this case which, though ultimately not used, was really, in my judgment, not rejected for any principle reason. We welcome the court's willingness to review this plan with us. It is not set in concrete. There can be changes to it. It does not represent, as the Herald Statesman has editorialized, a rush job, but at least for me a culmination of many years of thinking about these issues, and it should not be regarded as something that was thrown together in five minutes.

THE COURT: Does anyone else wish to be heard? I will meet with the parties in chambers. But does anybody else wish to be heard in open court?

Mr. Dudley?

MR. DUDLEY: Your Honor, I have a couple of questions. One is, it seems to me, that Court Exhibit A is understandably, and I suppose necessarily at this point, a (26) sketch. I would assume that there is a lot of flesh that needs to be put on the bone that isn't here yet. I would like to inquire of the NAACP and the city, through the court, if I may, whether it is anticipated that this document is going to be made more specific so that other parties, including the school board, will have a better opportunity to comment meaningfully on it than it seems to me we do at this point.

For example, our interest, obviously, is in what happens at the Whitman site and what significance this has for the school board's interest in the utilization of the building at Whitman. There isn't any indication in this document, so far as I can see, as to what kind of a layout at Whitman is envisioned, what parcels at Whitman would be used, which would be preserved, what would happen with the building, and so on and so forth. That is one question in terms of process that I have.

My second question relates to the role of Mr. Newman and the cautionary remarks that your Honor made earlier this morning. We have in the past, I know I have in the past, from time to time tapped the expertise of the outside housing adviser. His views on sites have been helpful to me. That I have certainly been relevant. Frankly, to this point the school district has not retained a planning expert or a housing expert to assist it in an (27) independent analysis of proposals such as these. I guess I am looking for a little further guidance from the court as to what communications are permissible with Mr. Newman and which are not.

THE COURT: Direct your inquiries to the court. If that I are matters that fall within the areas of his expertise and I deem it appropriate, I will pass them.

MR. SUSSMAN: May I respond to the question?

THE COURT: Does that respond?

MR. DUDLEY: If I could get a response to my first question, it would be helpful, which was how to get more detail.

THE COURT: Further detail of this. I am wondering whether you want to respond to that now or whether you want to respond to that in conference.

MR. SUSSMAN: I think I should say something publicly to that.

Both with respect to the precise site at Austin Avenue, where Mr. Newman and perhaps your Honor will recall, there were two specific sites discussed, site D and site Q at specific points in time and with regard to the specific site at Austin and how the buildings could be used by all concerned, we purposely left those issues open. We felt, for example, that with regard to HUD, there are two specific sites at Austin. We have no particular view that one of (28) those sites rather than the other must

be used. Our view is that that I are two sites, that I both have advantages from our point of view, and perhaps disadvantages. We don't want to be wedded to one. We felt that was a process that we should be involved in with HUD. As your Honor intimated a short time ago, hopefully there will be informal contacts and we can get that straight.

Likewise with the school board. We would like to have contact with them to see if we can accommodate the social services needs, the recreation needs, the day care needs which the people will have and to accommodate the school board's needs. We don't see that as impossible.

MR. CURRAN: Maurice Curran for the school board. I now would like to mention to the court the September 2 order which is still in effect. This has to do with respect to the creation of the separate trust fund. I believe, your Honor, that the order should remain in effect until the matter is stabilized. The court stated clearly that there had been compliance. There seems to be no question about compliance. On the other hand, the court leaves open the question as to a possibility of resumption of fines. At the outset of the court's remarks—

THE COURT: No more than exists in any litigation. I am not predicting future contempt on the partof Yonkers. It is my devout wish that that not take place. (29) I don't think that one can talk about a permanent alteration in the fiscal management of the city because it was at one point in contempt.

MR. CURRAN: The board's position, your Honor, is that the court's order up to the present time has been implemented only to the extent of a bank account. The funds remain commingled and mixed. The board's position is that that I should remain so. The board's position is that the special account fund, to the extent it contains revenues, should be retained in that special account until released by the court back to the city.

THE COURT: How much money is now in the special account? I am not certain at what point we started splitting the checks.

MR. CURRAN: I believe it is approximately 200,000.

THE COURT: Is that what you are directing your remarks to, whether the $200,000 goes to the school board or back to the city?

MR. CURRAN: We are not saying it should go to the school board. There is only one fund and it should remain one fund. We believe the order should remain in effect with respect to the creation of a trust fund.

THE COURT: You mean in the event that there is a further contempt and further apayment of fines?

(30) MR. CURRAN: In the event that this present order is not stabilized.

MR. SUSSMAN: That has nothing to do with it.

THE COURT: When Yonkers was purged of contempt, as it has been, that order became inoperative. If we ever reach the unhappy state that there is again contempt, we know several things. We know that the fine level begins where it left off, that is, $819,000 or whatever it is for the first day and then the million, and then it caps at a million thereafter. We know that. I would certainly, if that happened,, unless there is a radical change in circumstances, reinstitute the arrangement between the school board and the city with respect to fines, and so on. I see no reason now why that should continue to be an operative order.

MR. CURRAN: The board of education agrees with the court. It is inoperative for all practical purposes at the present time. If the court, therefore, at this point right now decided the court order is no longer in effect, the board of education fully consents to that, your Honor, and requests that whatever funds are in the special account be returned to the city. This court made specific reference to the imposition of fines to the individual taxpayers—

THE COURT: Why don't you, together with counsel for the city, prepare an order which I can give to the (31) cashier.

MR. HEROLD: I on behalf of HUD I would like to say that we do object to going forward with this review. The court mentioned earlier that Yonkers had learned a very expensive civics lesson. But it is my understanding that if Yonkers fails to pass the necessary ordinances or resolutions to support this plan down the line, that would not be an act of contempt.

THE COURT: That is correct, it would not be an act of contempt, because if Yonkers doesn't pass it, it will never be embodied in a court order.

MR. DUDLEY: That is correct. So there is no penalty to Yonkers.

THE COURT: Yes. So HUD will have to expend time and effort in the next two weeks, as will the Department of Justice, as will all of us, and it may be a wasted effort. It is worth it.

We have a poor family awaiting a sentence, and moments spent awaiting sentence are very long moments indeed. I would like to adjourn and resume at about 11:45 in the robing room.

(Recess)

EXHIBIT R—Affidavit of Peter Chema Dated August 17, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF PETER CHEMA,

Appellant,

UNITED STATES OF AMERICA,

Appellee,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

Docket No.:
88-8074

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Peter Chema deposes and says:

1. I am a city Councilman of the City of Yonkers, now representing the Second District on Yonkers West Side, where I was born and raised.

2. I was elected to my present office in an election held in November 1987. Thereafter, in votes taken by the City Council, I voted against City approval of the consent decree entered on January 28, 1988 and against City approval of the Long Term Plan Order entered on June 13, 1988.

3. This is my third term as a City Councilman, the first two occurring during the years 1980-1984. At that time, I represented Yonkers' First Ward (also on the West Side) which then contained most of the City's subsidized housing. I was elected as a Republican in an area which was overwhelmingly registered as Democrats by a margin of about 6:1.

4. I have always been an advocate of my constituents' right to live in decent housing. For example, during my first term as a Councilman, I travelled by bus to New York with my constituents and testified in court on their behalf in a civil suit. In my testimony, I described substandard housing conditions as I had seen them and from an engineering perspective, drawing upon my education and college degree as a civil engineer.

5. Many of these conditions continue to persist on the West Side. The district court's Long Term Plan does nothing to address those people left behind in substandard housing on the West Side.

6. Last night, the City Council voted on the Affordable Housing Ordinance. I voted because I believed and was advised that paragraph 6 of the district court's order of July 26th and this Court's interpretive letter dated August 10, 1988 required me to vote.

7. At last night's public City Council meeting many people from Yonkers gave their views. Overwhelmingly, they urged the City Council not to approve the legislation.

8. In casting my voice vote last night against the zoning ordinace, I said the following:

> I cast my vote in the exercise of my First Amendment right to freedom of speech and to vote. I also cast my vote as a representative of my constituents to give meaning to their First Amendment right to petition the government through their elected officials.
>
> I vote today because I have been ordered to do so. My conscience will not permit me to vote "Yes" because I have been ordered to do so.
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution which I believe is the supreme law of the land. I welcome the chance to present my position to the Court of Appeals this Wednesday.

9. I do not believe that it is in the public interest to continue weekly City Council meetings at which votes are taken under Court direction while this matter is under appellate review. Nonetheless, if this court grants a stay of the July 26th order, I will remain available day and night to attend a City Council meeting to reconsider the legislation when so requested by any

member of the Council. Finally, I consent to the issuance of a stay on such a condition.

PETER CHEMA

Sworn to before me this
17th day of August, 1988
Nancy L. Vincent
Notary Public, State of New York

No. 31-4787243
Qualified in New York County
Certificate Filed in New York County
Commission Expires Aug. 31, 1989

88-856 (3)

Nos.

DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

PETER CHEMA, HENRY SPALLONE, NICHOLAS LONGO & EDWARD FAGAN and CITY OF YONKERS,

Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, et al.,

Respondents.

YONKERS BRANCH NAACP et al.'s BRIEF IN OPPOSITION TO GRANTING OF WRITS OF CERTIORARI

MICHAEL H. SUSSMAN
SUSSMAN & SUSSMAN
30 South Broadway
Yonkers, NY 10701
(914) 968-4558

GROVER G. HANKINS, ESQ.*
NAACP SPECIAL CONTRIBUTION FUND
4805 Mt. Hope Drive
Baltimore, MD 21215
(301) 358-8900

*Counsel of Record in Supreme Court of the United States and member of Bar, the Supreme Court of the United States

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

31 pp

TABLE OF CONTENTS

Page

I. Statement of Facts 1

II. The Petition Should All Be Denied 9

A. The District Court Properly Found And The Court of Appeals Properly Affirmed The Contempt of Court Citations and Sanctions Against The City And The Individual City Council Members 9

1. Legislative Immunity Does Not Apply.....10

2. The City of Yonkers Was Also properly Held Liable 17

3. The Fines Against Yonkers Were Not Excessive.....19

4. The District Court did Not Abuse its Discretion by Requiring Yonkers to Comply with the Consent Decree 23

III. Conclusion 25

CASES CITED

Aitchison v. Kaffiani, 708 F.2d 96 (3d Cir. 1983).....12

Ashley v. City of Jackson, 464 U.S. 902 16

Bankers Life & Casualty Co. v. Crenshaw, 108 S.Ct. 1645 (1988).....22

Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1143, n. 13 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 1302 (1988).....22

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980).....11

Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982).....12

Gorman Towers Inc. v. Bogoslavsky, et al., 626 F.2d 607 (8th Cir. 1980).....10

Griffin v. County School Board, 377 U.S. 218, 233 (1964) 25

Hernandez v. City of Lafayette, La., 643 F.2d 1188, 1191-92 (5th Cir. 1981).....11

Hicks ex rel. Feiock v. Feiock, 108 S.Ct. 1423, 1430 .20,21

Ingraham v. Wright, 430 U.S. 651 (1977).....19-20

Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 04 (2d Cir. 1988).....22

Kuzinick v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982).....11

Lake Tahoe Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).....11,14

Local 93, International Association of Firefighters, AFL-CIO v. Cleveland, 106 S.Ct. 3063, 3077 (1986).....13,15,16

Maggio v. Zeitz, 333 U.S. 56 (1948).....18,21,24

Milliken v. Bradley, 433 U.S. 267 (1977).....25

Owen v. City of Independence, 445 U.S. 622, 645 (1980).....17

Parklane Hosiery v. Shore, 439 U.S. 322, 327 (1979).....16

Pembaur v. Cincinnati, 475 U.S. 469 (1986).....17

Penfield Co. v. Securities & Exchange Commission, 330 U.S. 585 (1947).....20,21

Powell v. Texas, 392 U.S. 514, 531-32 (1968).....19

Reed v. Village of Sherwood, 704 F.2d 943 (7th Cir. 1983).....12

St. Louis v. Prapotnik, 99 L.Ed., 107, 114 (1988).....17

Shillitani v. United States, 384 U.S. 364 (1966).....20

Star Distributors v. Marino, 613 F.2d 4 (2d Cir. 1980)...12

United Catholic Conference v. Abortion Rights Mobilization, 56 USLW 4672 (1988).....24

United States v. Armour & Co., 402 U.S. 673, 676-77 (3075-76).....16

United States v. Board of School Commissioners of the City of Indianapolis, 368 F.Supp. 1191, *aff'd*, 483 F.2d 1406, *cert. denied*, 421 U.S. 929 (1975).....16

United States v. United Mine Workers, 330 U.S. 258 (1946).....19,20-21

United States v. Yonkers Board of Education, 624 F.Supp. 1276 (S.D.N.Y. 1985).....1

United States v. Yonkers Board of Education, 635 F.Supp. 1577 (S.D.N.Y. 1986).....3

In The
Supreme Court of the United States
October Term, 1988

PETER CHEMA, HENRY SPALLONE, NICHOLAS LONGO & EDWARD FAGAN and CITY OF YONKERS,
Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, et al.,
Respondents.

RESPONDENT YONKERS' BRANCH NAACP et al.'s OPPOSITION TO GRANT OF WRITS OF CERTIORARI

This matter comes before the Court on four separate petitions for writs of certiorari.* For the reasons which follow, all these petitions should be summarily denied.

I. STATEMENT OF FACTS

In November 1985, the district court, Sand, J., held that the City of Yonkers had violated the Equal Protection rights of a class of black and Hispanic persons by concentrating nearly all (97%) subsidized housing in one quadrant of the city and by refusing, for racially motivated reasons, to allow the placement of such housing in white neighborhoods. *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985).

---

*Filed by the City of Yonkers; Councilmen Fagan and Longo; Councilman Chema and Councilman Spallone.

On appeal, the Court of Appeals affirmed the City's constitutional and statutory liability in all regards. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987) and this Court refused to entertain the City's petition for a writ of certiorari, 108 S.Ct. 2821 (1988).

On December 15, 1985, more than three years ago, the district court directed the City to submit, within two months, a remedy plan and scheduled comments from the other parties, principally plaintiff, United States, and plaintiff-intervenors, Yonkers Branch NAACP, et al.

In February 1986, the City presented a remedy which contemplated no affirmative municipal action aimed at curing the pervasive segregation found to exist by the district court. Instead, the City submitted that entry of an injunction barring it from engaging in racial discrimination would suffice to remedy the forty year pattern of segregation found below.

Both the United States and the NAACP objected to this limited remedial approach. In the first instance, through two City Council resolutions adopted by its City Council in 1980 and 1982, the City of Yonkers had agreed to site 200 units of assisted housing as a condition for accepting Community Development Block Grant (CDBG) funds from HUD. *See*, 42 U.S.C. 5301, et seq. In March 1984, in a Consent Decree with plaintiff-intervenors, HUD agreed to make available funds sufficient for the construction of 200 units of public housing within ninety days. Notified of the availability of such monies, Yonkers first failed to submit any sites (as it was required to do by its own past promises upon notice of fund availability) for this housing and then submitted two sites HUD found totally unacceptable. By early 1986, Yonkers continued to refuse to provide suitable sites for these 200 units of public

housing. And, now in its remedial proposal, the City continued to provide no suitable sites.

Second, both plaintiffs maintained that the scope of the adjudicated violation—the racially motivated placement of nearly 7,000 assisted units in a one square mile area of minority-dominated southwest Yonkers—demanded affirmative relief broader than the placement of 200 units of public housing in white neighborhoods. Again, Yonkers disagreed and proposed no remedial plan to the district court.

On May 28, 1986, after a six day hearing at which the City was represented by counsel, the district court entered its housing remedy order. *United States v. Yonkers Board of Education*, 635 F.Supp. 1577 (S.D.N.Y. 1986). This order has since been affirmed in full by the Court of Appeals and this Court has refused to entertain any challenges to its validity. *Id.*

By terms of the remedy order, Yonkers was required (a) within 90 days to submit sites for 20 units of public housing and (b) by November 15, 1986 to submit a "long term housing plan" showing how it intended to increase the supply of "affordable" housing in non-minority areas.

Within ninety days, the Yonkers City Council, the legislative body of the municipal government, refused to submit any sites for the 200 units of public housing.[1]

---

1. The May 28, 1986 remedy order provided that should Yonkers not timely submit sites for public housing, three sites, Whitman; School 4 and School 15, would be "deemed" submitted to HUD for these units. After the City's default, HUD approved as suitable the first two sites for 160 units of public housing. This left a shortfall of 40 units which were still left unsited.

Likewise, the November 15 deadline for the long term housing plan came and went with only a letter from the City's attorney advising that Yonkers had no intention of complying with the court order and would not present a long term housing remedy plan.

In this light, in late 1986, both the NAACP and the United States sought relief: the United States moved that the City be held in contempt for failure to comply with the May 1986 remedy order and, in addition to such a finding, the NAACP sought appointment of a housing administrator to implement the remedy.

In early February 1987, as Yonkers continued to resist compliance with the remedy order, the district court required the City to retain an "Outside Housing Advisor" (OHA) to identify suitable sites for the remaining units of public housing and to develop a long term housing plan. By April, the OHA had identified a large number of suitable parcels. The Yonkers City Council refused, however, to commit to the submission of these sites to the district court and to HUD and the stalemate continued through 1987.[2]

---

2. First, the City Council attached repugnant conditions to any affirmative action, i.e., submission of sites, it was required to take, i.e., rather than providing the housing to those on the Municipal Housing Authority waiting list (90% minority), the City conditioned its compliance on the creation of "neighborhood" tenant selection councils which would select tenants; rather than proceeding with development of the suitable sites and thus fulfilling its longstanding commitment to HUD, the City sought, as price for any cooperation, a stay of its obligations until final review of the merits by this Court. (This condition was demanded after both the Court of Appeals for the Second Circuit and this Court had denied Yonkers' stay motions in June 1986). After the district court rejected these conditions, the City Council announced that it would continue to defy the extant court orders.

By December 1987, the following situation obtained: the OHA, now working exclusively as an advisor to the district court,[3] had recommended the appropriateness of nine privately-owned sites, along with school 4; the Whitman School and another publicly held parcel associated with Lincoln High School, for the construction of 200 units of public housing in semi-detached or townhouse style. The OHA had suggested that six or seven of these sites be used so as to provide "scattered site" low density housing, avoiding an overconcentration of units at any given location. The plaintiffs agreed with this approach and submitted analyses to the district court of the suitability of the nine privately-held sites. In late December, the district court issued an order that Yonkers show at a hearing scheduled for January 8, 1988 what it had done to select sites for the 200 units. As well, the district court made clear its intention to select the sites for the public housing in early January, absent a radical change in conduct by the City.

On December 28, 1987, a unanimous panel of the Second Circuit affirmed the district court's liability and remedy holding "in all respects." *Ibid.* Yonkers retained new counsel and by January 27, 1988, the City Council had approved a Consent Decree apparently resolving the outstanding housing remedy issues. By this Decree, adopted by a five to two vote of the City Council, Yonkers agreed to site the 200 units of public housing on seven

---

3. As of July 1987, when it became even more apparent that Yonkers had no interest whatsoever in complying with the court order or with constructively using the services of the OHA, the district court ordered him to report exclusively to it and to serve as the court's expert.

sites; to purchase, through eminent domain if necessary, four of the required sites from their private owners and to implement a long term housing remedy plan, including, adoption by the City Council of an ordinance providing density bonuses and other forms of municipal incentives to developers to facilitate construction of 800 units of assisted housing in economically mixed (80-20) developments in white areas of the City.[4] The City Council also agreed to waive any further rights of appeal which it might have with regard to the housing remedy order.[5] (A-181L-182L)[6] It appeared that a new day of cooperation had dawned in Yonkers.

Appearances can be deceiving. In the next four months, the mood in Yonkers reverted to one of defiance; non-compliance and name-calling. One councilman compared the district court to Stalin and Hilter. A-91g. Another called Judge Sand "anti-Catholic". A third stated on the floor of the City Council that he wished the Judge were struck down and killed. And so it went as Yonkers spiralled into an almost unparalled confrontation with federal judicial authority.

---

4. Under this approach, all multi-family developments in white neighborhoods would be required to have 20% of their units at affordable rents or purchase prices, as set forth in the Decree. To make such developments economically feasible, Yonkers agreed to the range of incentives set forth in the First Remedial Consent Decree in Equity. While racial quotas were not contemplated in sales or rentals of this housing, the parties anticipated that the provision of economically diverse housing opportunities would predictably expand housing opportunities for minorities. Moreover, as part of the May 1986 Housing Remedy order, the district court created a Fair Housing Office to provide counselling for those in need of such housing opportunities and to assist in enforcing federal and state statutes prohibiting discrimination in rental and sales.

5. Section 10 of the First Remedial Decree in Equity.

6. Reference is made to the Appendix submitted by Petitioner Spallone.

First, public outcry surfaced concerning Yonker's 'surrender'of its right to seek review by this Court of the liability findings rendered by the district court. The City souht modification of this provision of the Consent Decree.[7] The plaintiffs opposed this motion which the district court denied. Next, Yonkers sought to vacate the entire Decree on the ground that the support of His Eminency, John Cardinal O'Connor, who initially had agreed to donate four acres of church property for the location of some 20 units of public housing, had been integral to the council members' willingness to enter the Decree and that his new-found opposition to the Decree was a "change of circumstance" sufficient to predicate vacation. Again, the district court denied this motion, futilely requesting Yonkers to agree to a site in substitution of the church-owned parcel.

As these legal developments unfolded between February and May 1988, the Yonkers City Council Chambers was turned into a raucous circus. Each meeting was dominated by a white mob which precluded the presence of minority citizens and dominated the proceedings. The City Council members, according to these residents, has sold them out by violating their election year (1987) campaign promises - to resist desegregation through all means available.

Defeated in its efforts to modify or vacate the operate Consent Decree, the majority of the City Council determined simply to abrogate its terms. As sites for public

---

7. Of course, notwithstanding its express agreement not to seek such review, the City filed a petition for a writ of certiorari in the Spring of 1988.

housing had already been selected,[8], the resisters attention began to focus on the long term housing plan. In the Consent Decree, Yonkers had agreed to enact a municipal ordinance implementing the long term housing plan. A-184L (Section 17 of First Remedial Consent Decree in Equity). But, council members hoped to win back the confidence of the mob by resisting this measure of compliance.

To this end, in March 1988, the City simply broke off negotiations whith plaintiffs aimed at finalizing language for the required ordinance. The district court then ordered the City to produce a draft ordinance, enactment of which was required by April 28, 1988. The City delayed before producing such a draft. After the parties met and finalized an agreeable draft, the City Council refused to pass the ordinance. In early summer, the district court gave the City Council the opportunity first to amend the proposed ordinance in any manner faithful to the Counsent Decree and then to postpone final passage until after the conduct of a public hearing. The Council continued to balk.

On July 26, 1988, the district court ordered the City Council to pass the ordinance or a resolution of intent to do so after a public hearing within five days or to face contempt of court sanctions. The Council refused by a four to three vote and after hearings conducted on August 2 and 4, 1988, the district court found the four non-compliant council members and the City of Yonkers in civil contempt and imposed fines of $500/day against the individual council members and $100, doubling for each day of non-compliance, against the City. The district court also directed that if, after ten days, non-compliance continued, the individual contemnors would be jailed.

---

8. The City appealed neither of these district court decisions.

On appeal, the Court of Appeals upheld the contempt citations against the individual contemnors and the municipality and modified the fine against the City by imposing a maximum daily fine of $1,000.00. This Court upheld the contempt citation and fines against Yonkers, but stayed both the citations and the sanctions against the individual council members.

II. THE PETITION SHOULD ALL BE DENIED

A. THE DISTRICT COURT PROPERLY FOUND AND THE COURT OF APPEALS PROPERLY AFFIRMED THE CONTEMPT OF COURT CITATIONS AND SANCTIONS AGAINST THE CITY AND THE INDIVIDUAL CITY COUNCIL MEMBERS

Petitioners seek review of the Second Circuit's affirmance of the district court's civil contempt citations and sanctions and highlight the following issues:

(a) does the doctrine of absolute legislative immunity shield individual council members from contempt citations and sanctions;
(b) whether the municipality as such was "incapable" of complying with the January 28 Consent Decree and the July 26 order and if, as alleged, it was not,
(c) whether, in any event, the contempt sanction against the City violated the Eighth Amendment's prohibition against excessive fines and
(d) whether the district court abused its discretion by requiring compliance with the terms of the Consent Decree as opposed to implementing those terms itself.

We discuss each question in turn.[9]

1. Legislative immunity does not apply

The Court of Appeals well-reasoned opinion conflicts with no opinion of another Circuit Court nor any precedent of this Court. Indeed, none of the seven cases cited by petitioners implicates any of the issues raised herein. In none of those cases was a legislator held in contempt for non-compliance with a Consent Decree to which he, as an officer of a defendant municipality, was a party. Indeed, each of those cases involves an entirely distinct issue: whether under 42 U.S.C. section 1983 a local legislator may be held individually liable for constitutional torts committed through legislative acts.[10]

---

9. Several other issues are mentioned, but these deserve only short consideration. First, there was no difference between the terms of the Consent Decree and the terms of the ordinance required by the district court. Indeed, Judge Sand repeatedly made clear that the Council could submit an ordinance of its own choosing so long as it reflected the previously entered Consent Decree. Moreover, the language presented to the City Council for a vote was worked out by counsel for Yonkers; a planning consultant retained by counsel and plaintiffs. Second, Chema submits that he is being forced into "coerced speech" or is the victim of "prior restraint" on his speech. As the Second Circuit noted, there is no bar to Chema's speech imposed in any manner by the Consent Decree. However, as an officer of the City, Chema is bound to comply with court orders directed against the City, as was the Consent Decree as of entry on January 28, 1988. Moreover, the concept of "prior restraint" has no meaning in this context, as the Consent Decree followed findings of pervasive and gross racial segregation and was intended to rectify that condition.

10. Thus, in *Gorman Towers Inc. v. Bogoslavsky, et al.*, 626 F.2d 607 (8th Cir. 1980), the Eighth Circuit determined that individual local legislators had immunity from lawsuits for money damages brought by citizens aggrieved at the passage of allegedly unconstitutional zon-

Following *Lake Tahoe Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979),

---

ing legislation. Of course, that is not the case here, where local legislators were held in contempt for their failure to fulfill obligations undertaken in the Consent Decree, not held subject to damage suits under section 1983.

Likewise, in *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980), plaintiff claimed that an unconstitutional zoning enactment diminished the value of his property. Finding that the act in question was plainly legislative, the Court of Appeals for the Fourth Circuit upheld dismissal of the suit on the basis of absolute legislative immunity. In *Riddle, supra.*, no prior court order required that the legislature act contrary to the manner in which it chose to exercise its authority, the precise factual circumstances presented by the instant case. Clearly, here, Yonkers' legislators had already committed themselves to pass the ordinance in question. Had they not, the district court would have been empowered to enter an order requiring acts necessary to cure constitutional violations. *See*, Proceedings of August 4, 1988, A-83g-87g.

In *Hernandez v. City of Lafayette, La.*, 643 F.2d 1188, 1191-92 (5th Cir. 1981), the Court of Appeals held that in exercising a veto of legislation, a Mayor exercises a legislative perogative, for which absolute immunity fully applies. In *Hernandez*, there was neither a preexisting Consent Decree requiring the Mayor to sign the ordinance in question nor any independent constitutional violation which passage of the ordinance was meant to cure.

In *Kuzinick v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982), the owner of an adult book store claimed violations of due process when local planning officials denied him renewal of an operating permit. The Court of Appeals held that "local legislators have complete immunity from suits based on their legislative acts." In so holding, the Ninth Circuit, *supra.*, at 1350 defined precisely how different that context was from the instant case: "The manifest need for a rule of absolute immunity is illustrated in this case—here legislators are involved in balancing social needs against constitutional rights, the kind of balancing which often produces plurality opinions, and almost always dissenting opinions, in the Supreme Court. These

each Circuit to have considered the issue has extended absolute immunity from suit under sec. 1983 to local

---

legislators now find themselves sued for a total of $2,500,000 general damages and $5,000,000 punitive damages by a plaintiff whose business, as nearly as we can determine from the record, has not been shut down one day." Of course, here, the Consent Decree settled the specific means by which Yonkers was to remedy adjudicated constitutional violations. Failure to implement its terms simply carried forward the violation. Moreover, of course, no private party sued the Yonkers' legislators in their individual capacities. Their liability stemmed from their intentional refusal to implement part of the Consent Decree to which they had, as a legislative body, agreed signed onto.

In *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), reviewing challenges to a municipally-inspired campaign to harass and ultimately close hotels catering to Cuban refugees, the Court of Appeals held that imposing liability upon Commissioners for "actions conducted outside their legislative roles does not undermine the policies granting immunity to certain officials." In the absence of legislative action, no immunity could be claimed.

In *Reed v. Village of Sherwood*, 704 F.2d 943 (7th Cir. 1983), a bar owner sued individual elected municipal officials claiming they had interfered with and destroyed the operation of his establishment. For their legislative act of reducing the number of liquor licenses from four to three, the Court of Appeals recognized local legislative immunity. *Id.* at 952. Likewise, in *Aitchison v. Kaffiani*, 708 F.2d 96 (3d Cir. 1983), the Court of Appeals held local legislators immune from suit for wrongful termination. As in the prior cases discussed, in *Reed* and *Aitchinson*, no independent obligation bottomed the liability of the local legislators, i.e., a consent decree or a prior finding of unconstitutional conduct on the part of the municipality the legislators serve as officers.

In short, refusing to hear these petitions would create absolutely no conflict between the Second Circuit and the opinions issued in other circuits. Indeed, the Second Circuit itself generally recognizes legislative immunity, *Star Distributors v. Marino*, 613 F.2d 4 (2d Cir. 1980), but the panel in this case properly distinguished the application of that doctrine from proper judicial sanction where a state legislature has been enjoined "from continuing its defiance of federal court desegregation orders." *See*, A26a.

legislators engaged in legislative activity. We do not challenge the validity of these rulings.

But, their logic does not control this case. Here, the members of the council agreed (by majority vote) to a Consent Decree which included, among its principal terms, municipal commitment to enact legislation implementing the long term housing remedy plan in order to remedy adjudicated constitutional violations. The Consent Decree included the objectives and central elements of that legislation and met all the characteristics of a valid Consent Decree enumerated in *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland,* 106 S.Ct. 3063, 3077 (1986). Rather than comply with this court order, the legislators refused to adopt the implementing legislation. In this context, implementation of the Consent Decree represented a ministerial, not a legislative act. The Council members had already committed, through a majority vote taken on January 27, 1988, to fulfill this act and were not free, as parties to constitutional litigation, simply to flaut this prior agreement meant to cure their violation.

The entry of contempt citations relates properly to the City's failure to fulfill both its voluntarily-made commitment to the federal court and its independent obligation to remedy the unconstitutional condition. *Shillitani v. United States,* 384 U.S. 364, 370 (1966) ("courts have inherent power to enforce compliance with their lawful orders through civil contempt.").

Moreover, the council members can point to no non-pretextual basis for their refusal to follow through on the commitment made to the plaintiffs and to the district court and their action simply intentionally perpetuated the racial discrimination previously found.

While petitioners claim that our constitutional system will be placed in jeopardy by upholding the contempt findings and sanctions against the individual council members, precisely the opposite is the case.[11] The question here is whether individual council members may violate their commitment, freely undertaken, and abrogate a contract made with the plaintiffs, on the one hand, and degrade the power of judicial authority by violating an order to vindicate constitutional rights on the other.

This question cannot, by definition, implicate the cherished freedoms individual council members have to represent their constituents as here the underlying obligation derives jointly from the council majority's own agreement to enter into the January 1988 Consent Decree on the one hand and their contitutional responsibility to cure unconstitutional conditions on the other. Neither of these imperatives—the first contractual and the second constitutional—may depend upon the vicissitudes or the shifting political coalitions of the moment.

Moreover, this case does not threaten this Court's desire, should that be so, to extend legislative immunity to local legislators. It is entirely consistent to hold that when performing legislative acts, i.e., consideration of a zoning ordinance absent the unusual circumstances of this case, legislators may not be sued in their individual capacities and to deny these petitions on the basis that here the City Council, acting through majority vote, agreed to comply with the Consent Decree and then failed to do so, prompting the use of traditional civil contempt sanctions.

---

11. As in *Lake Tahoe, supra*, here there is no strong showing that the English common law dictates the grant of legislative immunity to those at the local level. Indeed, viewed through the prism of the "public good," *Id.*, at 404-05, it is clear that insulating Yonkers' council members from responsibility for implementing the Consent Decree would strike a very severe blow to the commonweal.

Failure to honor the terms of a Consent Decree is properly dealt with by entry of a finding of civil contempt and sanctions. *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland,* 106 S.Ct. 3063, 3076 (1986) (Consent Decree enforceable by civil contempt); *United States v. City of Miami,* 664 F.2d 435, 440, n.8, 443. The council members provide no reasoned basis for excepting them from this general rule. The logic of this rule stems from the status of a consent decree—as an order of a federal court. And, disrespect of such a Decree is treated the same as disrespect of a judicially-initiated order.

Just as our society cannot function where private parties are permitted to reneg on agreements freely entered, chaos will break loose and, indeed, be encouraged, if local legislative bodies are not bound by their commitments. What would be the purpose of plaintiffs ever entering into a Consent Decree with a local legislative body if the members of that body can, with impunity, walk away from their agreement without consequence as soon as public antipathy develops to its terms? That is precisely the situation here.

Nor do those who voted against the Consent Decree initially have any more claim to judicial leniency. They, too, are bound by the terms of the Consent Decree as a court order. Contrary to the citations of petitioners, they are officers of the City of Yonkers. They do not stand to this litigation as a non-party union might to a dispute between black firemen and a municipal hiring agency. *Cf. Local 93, supra,* at 3079 ("A court's approval of a Consent Decree between some of the parties cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenors."); *Parklane Hosiery v. Shore,* 439 U.S. 322,

327 (1979) (a "Consent Decree cannot be used as a shield against all future suits by non-parties seeking to challenge conduct that may or may not be governed by the decree.").

Nothing demonstrates the frivolous and distorted nature of these petitioners more than their efforts to treat themselves not as agents or officers of Yonkers, but rather as third party intervenors. The district court has not imposed obligations here on any third party nor bound any third party to the obligations imposed in the decree. *Cf. Ashley v. City of Jackson*, 464 U.S. 902 (dissent from denial of writ of certiorari, Rehnquist, C.J., who noted that whites seeking relief from allegedly illegal consent decree were not parties to the decree or otherwise bound by its terms). Rather, after finding Yonkers constitutionally liable, the district court has accepted a Decree which clearly meets the characteristics set forth in *Local 93, supra*, at 3077. Nor has the court in any manner violated the rule that only "the parties to the decree can be held in contempt of court for failure to comply with its terms." *United States v. Armour & Co.*, 402 U.S. 673, 676-77 (3075-76). Citation to *United States v. Board of School Commissioners of the City of Indianapolis*, 368 F. Supp. 1191, *aff'd*, 483 F.2d 1406, *cert. denied*, 421 U.S. 929 (1975), where the district court observed that it could not enter an order against a non-party, the General Assembly of the State of Indiana, is of no saliency here.

And, once the Consent Decree became final, with Judge Sand's signature, it was as much as the obligation of those parties who opposed it as those who supported it to comport consistently with its terms. That, in short, is the nature of a Consent Decree agreed to by a legislative body.

2. The City of Yonkers Was Also properly Held Liable

Yonkers argues that because of the opposition of four of its seven council members, it could not comply with the underlying court order of July 26, 1988. This is a tautological argument which misrepresents the state of the law and lacks factual foundation.

The City Council is Yonkers' governing body. Its members are agents of the City. Under 42 U.S.C. sec. 1983, a municipality may be held liable for the actions of its decision-makers, the local legislature. *St. Louis v. Prapotnik*, 99 L. Ed., 107, 114 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); *Owen v. City of Independence*, 445 U.S. 622, 645 (1980) (holding municipality liable under 42 U.S.C. sec. 1983 "for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred or in the executive or corporate duties."). There is thus, in fact and law, no distinction between the City and its City Council.

As a municipality, Yonkers is properly held in contempt here precisely because its City Council - its governing body-has failed to comply with obligations undertaken in a binding Consent Decree, entered after findings of constitutional liability sustained by every reviewing court. Just as "a municipality has no 'discretion' to violate the federal Constitution", *Owen, supra.*, at 649, it has no leave to ignore the dictates of a Consnt Decree agreed to post-liability to vindicate constitutional rights. Nor have its officers - "[a] decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandate and did not weigh a risk that a violation might result in an award of damages from the public treasury." *Id.* at 655-56.

Throughout this litigation, the individual council members had no independent legal representation. They were, all agreed, "the City" for purposes of municipal decision-making. Indeed, recalcitrance and contumaciousness on the part of the majority of that body bottomed the escalating municipal spiral toward non-compliance in 1986 and 1987. Only after the district court made clear that sanctions would be imposed against both the individual council members and the City and after counsel for the City advised that he would not represent the contumacious majority in their individual capacities did these persons retain their own counsel and assert some juridical independence from the "City" of Yonkers. Whatever this maneuvering, it cannot and does not change the essential fact: the City, as the defendant in this action, failed to comply with the outstanding court order and the district court had authority to sanction it.

This is not a situation like those cited by Yonkers in its petition - where a party claims that it cannot comply with an order because of present incapacity. In such instances, either there was no governing body "above" the named contemnor, *Maggio v. Zeitz*, 333 U.S. 56 (1948) or the governing body, it was alleged, likewise lacked present capacity to comply with the underlying order. Here, the governing body of the municipality possessed precisely such capacity and the law countenances no distinction between its capacity to comply and that of the "City".

Nor is there any unfairness to holding the City qua City in contempt for failure to comply with the consent decree. After all, the decree was entered into by the City, not individually by each council member. Moreover, the council members acted defiantly in response to significant pressure from white residents who beseiged City Council meetings demanding continued disobedience to court

orders and to desegregation. For like situation, *See, United States v. United Mine Workers,* 330 U.S. 258 (1946) Where this Court upheld fines against the UMW as well as against the principal strike leader, Lewis. As here, this Court noted in *United Mine Workers,* that more than one officer of the union was involved in assenting to the illegal work stoppage and that Lewis himself represented the will of union members.

By making clear to individual council members that not only would they be sanctioned for continuing noncompliance, but the City would suffer financial ruination, the district court properly calculated those measures which would force compliance, the role of civil contempt.

3. The Fines Against Yonkers Were Not Excessive

The district Court imposed conditional sanctions against Yonkers of $100 for the first day of contempt doubling each day of outstanding contempt. The Court of Appeals modified this sanction by limiting the daily fines to $1,000.000. The City requests review of whether these sanctions violate the "excessive fines" clause of the Eighth Amendment.

As this Court squarely held in *Powell v. Texas,* 392 U.S. 514, 531-32 (1968) the Eighth Amendment was intended to apply to criminal sanctions, not those imposed in civil matters. "The primary purpose of [the Cruel and Unusual Punishment Clause] has always been considered, and properly so to be directed at the method or kind of punishment imposed for a violation of criminal statutes..." The "exclusive concern" of the English version of the Eighth Amendment "was the conduct of judges in enforcing the criminal law." *Ingraham v.*

Wright, 430 U.S. 651 (1977). While our framers were concerned as well with the conduct of legislators and administrators, the subject of the American counterpart was, likewise, "the criminal process". *Id.* at 666.

The very thought of applying that provision in a case where a party has, within its own capacity, compliance and the avoidance of any penalty is irrational and illogical. The imposition of sanction must be intended as "punishment" for the Eighth Amendment to apply. *Id.* at 670, n.39. Here, had Yonkers complied with the Consent Decree, no sanction at all would have been imposed. Had it complied within five days, the total fine would have been less than $3,000. Only because Yonkers chose and could choose to continue non-compliance for a long period can it even pose the question presented. We urge denial of Yonkers' writ with respect to this issue because the "excessive fines" provision of the Eighth Amendment does not properly apply to contempt citations entered to force compliance in civil litigation.

Here, there can be no doubt that Yonkers was subject to civil, not criminal, contempt. As in *Shillitani v. United States*, 384 U.S. 364 (1966) and *Penfield Co. v. Securities & Exchange Commission*. 330 U.S., 585 (1947), Yonkers was not sentenced to a fixed term of punishment, but, rather the district court announced a fine schedule, imposition of which depended on the City's own actions. Yonkers vainly argues that it was subjected to criminal, not civil, comtempt. This is entirely fallacious. Applying the principles set forth by this Court in a long series of cases, this case presents a classic use of civil contempt. *See, Hicks ex rel. Feiock v. Feiock*, 108 S.Ct. 1423, 1430 (sanction remedial and contempt civil, not criminal, if sanction prospective and actor may purge contempt by his own acts); *Penfield, supra.*, at 590; *United States v.*

United Mine Workers, 330 U.S. 258 (1947). Here, contingent sanctions were imposed prospectively. *Maggio, supra.* at 407.

While a schedule of sanctions was announced, its imposition wholly depended on whether Yonkers failed to take the requisite action to purge itself of contempt. Had the City purged itself, the schedule would have ceased to operate and fines would have been suspended. *Hicks ex rel Feiock, supra,* at 1431 ("The critical feature that determines whether the remedy is civil or criminal in nature is not whether the contemnor is physically required to set foot in a jail but whether the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the . . . order".)

Understanding this context answers the question presented in another way. Given that the primary purpose of civil contempt is to gain compliance with outstanding court orders, a party's resistance to comply, day after day, with fines mounting, suggests that the level of sanction is, if anything, too modest, not excessive. Here, after this Court refused to stay the imposition of the fines against the City, compliance was achieved within days and the City paid a total of less than $1,000,000 in total fines. Why? The sanctions were effective in (a) insuring the citizenry of the district court's seriousness and (b) causing the municipality to circulate plans for a massive cutback in municipal services, including the curtailment of garbage collection and the lay-off of workers. A lesser sanction would simply have lead to a more protracted state of noncompliance and disrespect for the law. "The dilatory tactics employed [by Yonkers] suggest that if justice were to be done, coercive sanctions were necessary." *Penfield, supra,* at 592.

Finally, the City submits that several Courts of Appeal have determined or assumed that the excessive fines clause applies to civil litigation.[12] It cites two cases upholding the propriety of punitive damage awards even assuming the applicability of this provision. However, neither Court of Appeals determined that the provision does apply to civil litigation, even in the punitive damage context where, concededly, the state purpose is to "punish" the wrongdoer by permitting a jury to use its discretion in setting the quantum of an award.

Whatever considerations might lead this Court to apply the "excessive fines" clause to such a setting, where the state clearly intends the punitive damage award to serve both as punishment and deterrent, the same cannot be said of a fine imposed to gain compliance in civil litigation with an outstanding court order. It bears no relation to punishment.

Thus, contrary to the City's plea, this is a poor and atypical case for this Court to take for the purpose of determining whether the excessive fines clause limits punitive damages in state civil cases. *Cf. Bankers Life & Casualty Co. v. Crenshaw,* 108 S.Ct. 1645 (1988) (jury awarded $1.6 million in punitive damages in loss of limb case where insurance company refused to timely pay compensatory damages of $20,000).

---

12. *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 04 (2d Cir. 1988); *Brown & Williamson Tobacco Corp. v. Jacobson,* 827 F.2d 1119, 1143, n. 13 (7th Cir. 1987), *cert. denied,* 108 S.Ct. 1302 (1988).

4. The District Court did Not Abuse its Discretion by Requiring Yonkers to Comply with the Consent Decree

Invoking the spector of courts intervening in local legislative functioning or chilling local deliberative processes, petitioners suggest that the district court abused its discretion by requiring the City and its council members to fulfill the obligations freely undertaken in the Consent Decree and by failing to appoint a master. These arguments badly miss the point of this case and would, in fact, cause the federal courts to implicate themselves more, not less, in municipal affairs.

First, the district court clearly acted within its authority in requiring a party to fulfill commitments made in a Consent Decree. Here, plaintiffs bargained for Yonkers to comply with the Constitution and remedy its historic violations, not for the court continually to have to displace local authority to insure vindication of constitutional rights. Plaintiffs sought contempt findings beginning in November 1986 and the district court, if anything, showed undue patience with the obviously recalcitrant city.

Moreover, the court had "acted for" the City on many prior occasions, i.e., submission of sites to HUD for original 200 units of public housing upon municipal default; application for City to HUD for continued receipt of CDBG funds after City refused to submit housing assistance plan required of recipients of federal funds. At some point, the district court properly concluded, Yonkers had to take responsibility for fulfilling its constitutional obligations, not merely allowing its political process to be manipulated and controlled by the white mob.

Second, the district court had before it Yonkers' express agreement to pass the implementing zoning legislation and a draft ordinance endorsed in all particulars by counsel. The ordinance was not self-executing and for the court to ignore Yonkers' continued recalcitrance and simply deem the ordinance enacted falsely suggests its self-implementing nature. As the ordinance, to be effective, needed Yonkers' support, the district court properly resolved to disallow the City from continuing to abdicate fulfillment of its constitutional functions.

Finally, no party doubts that the district court had subject matter jurisdiction and authority to enter the Consent Decree and the Order of July 26, 1988 requiring compliance therewith. *Cf. United Catholic Conference v. Abortion Rights Mobilization,* 56 USLW 4672 (1988) (holding the Court of Appeals required to decide whether district court had subject matter jurisdiction before determining the enforceability of a discovery-related subpoena and the propriety of holding non-party in contempt for failing to honor the same). This is not the appropriate time to challenge the rightfulness of the underlying orders for "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a re-trial of the original controversy." *Maggio, supra,* at 408. So long as a judicial order remains in place, all those governed by its terms must comply or face, as here, the consequences. In light of the assumed propriety of the long term housing remedy ordinance and no one disputes that, the City council members disobeyed its terms at their own risk.

III. Conclusion

The lower courts properly held Yonkers and its council members in contempt for failure to comply with lawful court orders which were required to vindicate constitutional rights. Just as this court directed the lower court to order the Prince Edwards' Board of Supervisors to take affirmative acts necessary to run its public schools in a constitutional manner, *Griffin v. County School Board,* 377 U.S. 218, 233 (1964), here, the actions of the district court were required to insure that Yonkers cure the underlying housing segregation found here to have been caused by intentional racial segregation. Likewise, courts have the authority to order legislatures to appropriate funds to cure constitutional violations, i.e., *Milliken v. Bradley,* 433 U.S. 267 (1977).

The authority to so order carries with it the need and the power to enforce compliance through civil and criminal contempt. Absent the clear grant of such authority to our lower courts, legislators can, with impunity, perpetuate the violation of constitutional rights and continue to pander, as in Yonkers, to misinformed constituents who, in turn, demand non-compliance. The resulting paralysis of the political process merely continues the abridgment of civil rights while it hides or tries to hide behind legal technicalities. Denial of these writs will ad-

vance the end of justice and do so in a manner which is consistent with our nation's highest legal traditions.

Respectfully submitted,

MICHAEL H. SUSSMAN
SUSSMAN & SUSSMAN
30 South Broadway
Yonkers, NY 10701
(914) 968-4558

GROVER G. HANKINS, ESQ.*
NAACP SPECIAL CONTRIBUTION FUND
4805 Mt. Hope Drive
Baltimore, MD 21215
(301) 358-8900

*Counsel of Record in Supreme Court of the United States and member of Bar, the Supreme Court of the United States

(2) (3) (4) (2)

Nos. 88-854, 88-855, 88-856, and 88-870

FILED

FEB 1 1989

In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

31 pp

QUESTIONS PRESENTED

1. Whether the doctrine of legislative immunity barred the imposition of civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

2. Whether the district court abused its discretion in imposing civil contempt sanctions against members of the Yonkers City Council as a proper remedy for the refusal of the City of Yonkers, acting through the Yonkers City Council, to comply with the consent decree.

3. Whether the First Amendment prohibited the district court from imposing civil contempt sanctions against members of the Yonkers City Council for refusing to enact legislation to remedy the City of Yonkers' practice of racial discrimination in public and subsidized housing, where the specific obligation to enact such legislation arose from the consent decree earlier approved by the Yonkers City Council and entered by the district court at the remedial stage of litigation against the City of Yonkers.

4. Whether the district court violated the Due Process Clause in holding petitioner Peter Chema in contempt.

5. Whether the City of Yonkers may be held in civil contempt when, acting through the Yonkers City Council, the City refuses to comply with the consent decree.

6. Whether the district court's imposition of escalating fines for the City of Yonkers' civil contempt violates the Excessive Fines Clause.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Argument	11
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 16
Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986) 24
Aitchison v. *Raffiani*, 708 F.2d 96 (3d Cir. 1983) 13
Bankers Life & Casualty Co. v. *Crenshaw*, No. 85-1765 (May 16, 1988) 24
Browning-Ferris Indus. v. *Kelco Disposal, Inc.*, cert. granted, No. 88-556 (Dec. 5, 1988) 23, 25
Bruce v. *Riddle*, 631 F.2d 272 (4th Cir. 1980) 13
Butz v. *Economou*, 438 U.S. 478 (1978) 14
Clarke v. *United States*, No. 88-3190 (D.D.C. Dec. 13, 1988), appeal pending, No. 88-5439 (D.C. Cir.) 21
Cooper v. *Aaron*, 358 U.S. 1 (1958) 14
Espanola Way Corp. v. *Meyerson*, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983) 13
Forrester v. *White*, No. 86-761 (Jan. 12, 1988) 15
Gorman Towers, Inc. v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) 13
Gravel v. *United States*, 408 U.S. 606 (1972) 15, 20
Griffin v. *County School Bd.*, 377 U.S. 218 (1964) 14
Hernandez v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982) 13
Hutto v. *Finney*, 437 U.S. 678 (1978) 18
Ingraham v. *Wright*, 430 U.S. 651 (1977) 23
Kilbourn v. *Thompson*, 103 U.S. 168 (1880) 20
Kuzinich v. *County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982) 13
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 12-13, 20

Cases – Continued: Page

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) . 21
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 15
Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986) 22
Reed v. *Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) 13
Regal Knitwear Co. v. *NLRB*, 324 U.S. 9 (1945) 16
Shillitani v. *United States*, 384 U.S. 364 (1966) 18, 19
Solem v. *Helm*, 463 U.S. 277 (1983) 24
Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1980) 12, 13, 14, 15
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 18
Tenney v. *Brandhove*, 341 U.S. 367 (1951) 13, 20
United States v. *Gillock*, 445 U.S. 360 (1980) 14, 15
United States v. *Lovasco*, 431 U.S. 783 (1977) 16
United States v. *Nixon*, 418 U.S. 683 (1974) 15
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 15, 18, 24
United States v. *Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), certs. denied, Nos. 87-1632 and 87-1686 (June 13, 1988) 5
United States v. *Yonkers Bd. of Educ.*, 675 F.Supp. 1407 (S.D.N.Y. 1987) 4
United States v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413 (S.D.N.Y. 1987) 4
United States v. *Yonkers Bd. of Educ.*, 662 F.Supp. 1575 (S.D.N.Y. 1987) 4
United States v. *Yonkers Bd. of Educ.*, 635 F.Supp. 1577 (S.D.N.Y. 1986) 3
United States v. *Yonkers Bd. of Educ.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) 2, 3
Uphaus v. *Wyman*, 360 U.S. 72 (1959) 23
Wrzeski v. *City of Madison*, 558 F.Supp. 664 (W.D. Wis. 1983) 20-21
Yonkers Racing Corp. v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), petition for cert. pending, No. 88-1029 . 6, 17

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) 20
Amend. I 17, 19, 20

Constitution, statutes and rules – Continued: Page

Amend. V (Due Process Clause) 21, 22
Amend. VIII 23, 24
Excessive Fines Clause 23, 24
Cruel and Unusual Punishment Clause 23, 24
Amend. XIV (Equal Protection Clause) 2, 11
Civil Rights Act of 1968, Tit. VIII (Fair Housing Act), 42 U.S.C. 3601 *et seq.* 2, 11
District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, Tit. I, § 145, 102 Stat. 2269 21
N.Y. Pub. Off. Law § 2 (McKinney 1952) 16
Fed. R. Civ. P.:
Rule 65(d) 16
Rule 70 18

Miscellaneous:

City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission (July 25, 1988) 9, 18
Comments of the United States (July 22, 1988) 9

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-854

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-855

CITY OF YONKERS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-856

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-870

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 856 F.2d 445.[1] The pertinent orders and opinions of the district court contained in petitioners' appendices are unreported: order requiring compliance with consent decree, July 26, 1988 (Pet. App. 160j-163j); modification letter, July 28, 1988 (Pet. App. 159i); oral opinions finding petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 4, 1988 (Pet. App. 98g-99g, 129h-132h, 143h-144h, 157h); orders adjudicating petitioners City of Yonkers and members of the Yonkers City Council in civil contempt, August 2 and 5, 1988 (Pet. App. 72f-74f; 88-855 Pet. App. 65a-67a; 88-870 Pet. App. 15a-18a).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The petitions for a writ of certiorari were each filed on November 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After more than 90 days of trial in 1983 and 1984, the district court issued an opinion on November 20, 1985, holding petitioner City of Yonkers liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.* *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985). The court found that the City of Yonkers had deliberately concentrated virtually all of its

[1] "Pet. App." refers to the appendix to the petition in No. 88-854, unless otherwise indicated.

public and subsidized housing in the southwest quadrant of Yonkers in order to maintain racial segregation. The court based its holding in large part upon the actions and inactions of the Yonkers City Council and individual Council members. See 624 F. Supp. at 1295-1328, 1342-1363, 1369-1372.[2]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order" that required the City of Yonkers and the Yonkers City Council to take a number of actions designed to facilitate the development of public and subsidized housing outside of Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[3] Part VI of the Order required the City, by November 1986, to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See *id.* at 1582.[4] The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable for the development of such housing, or to prescribe how such housing should be provided. In-

---

[2] Evidence of segregative intent included City Council members' acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (624 F. Supp. at 1369-1372), the City Council's reluctance to seek federal Section 8 housing certificates and, when the certificates were obtained, the confining of their use to minority families only in Southwest Yonkers (*id.* at 1342-1363).

[3] As petitioner City of Yonkers acknowledges, the Yonkers City Council is the City's governing authority (88-855 Pet. 5 n.3). Unless the context otherwise requires, we will therefore refer collectively to the City of Yonkers and the Yonkers City Council as the City.

[4] Part IV of the Housing Remedy Order required the City to designate sites for 200 units of public housing in East Yonkers. 635 F. Supp. at 1580-1581.

stead, the court left to the City both the opportunity and the responsibility for proposing the substantive aspects of the Plan. *Ibid.* The City, however, refused to submit any proposal for the Long Term Plan (Pet. App. 6a-7a). Indeed, the City took "no significant action to comply with the 1986 Housing Remedy Order" for the first year and a half after its entry (*id.* at 7a).[5]

---

[5] The City's recalcitrance was not limited to the Long Term Plan. The City also refused to designate public housing sites, as required by Part IV of the Housing Remedy Order (Pet. App. 5a-6a). In December 1986, after the City had refused to submit a Long Term Plan proposal, the United States moved to have the City held in contempt. The Yonkers Branch of the National Association for the Advancement of Colored People, representing the class plaintiffs, meanwhile moved for the appointment of a special master to carry out the City's responsibilities under the Housing Remedy Order. The district court permitted the City to avoid contempt sanctions only after the City agreed to hire an Outside Housing Advisor to assist it in carrying out the Housing Remedy Order. Nonetheless, throughout 1987, the City continued to frustrate the court's and the plaintiffs' efforts to implement that Order. *Id.* at 7a. In fact, as the history of this litigation shows, the City acted constructively only when threatened with contempt. See, *e.g.*, *United States* v. *Yonkers Bd. of Educ.*, 662 F. Supp. 1575 (S.D.N.Y. 1987) (88-856 Pet. App. 1j-23j) (City Council took steps to advance its own remedy plan only after court threatened contempt and fines); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1407, 1410 (S.D.N.Y. 1987) ("It will come as no surprise to anyone familiar with the history of this litigation that the City has acted in a negative or at best neutral fashion with respect to all efforts to implement the Court's Housing Remedy Order, and that any initiatives to further such implementation have come from the Plaintiffs, Plaintiff-Intervenors, or the Court itself."); *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413, 1414 (S.D.N.Y. 1987) ("[T]he attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.").

The City appealed the district court's orders, although implementation of the Housing Remedy Order was not stayed (Pet. App. 6a). In a lengthy opinion, the court of appeals affirmed the district court's orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, Nos. 87-1632 and 87-1686 (June 13, 1988).

2. In January 1988, following the court of appeals' affirmance of the district court's orders, the parties negotiated the "First Remedial Consent Decree In Equity" (Consent Decree), which set forth the actions the City would take in order to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order (Pet. App. 178*l*-185*l*). The Yonkers City Council approved the Consent Decree on January 27, 1988. The district court entered the decree as a consent judgment on January 28, 1988. *Id.* at 8a.

Sections 12 through 18 of the Consent Decree established the framework for the Long Term Plan that had been left unresolved in the original Housing Remedy Order (Pet. App. 182*l*-185*l*). The Decree set a goal of 800 units of assisted housing to be developed over four years in conjunction with market rate housing developments (*id.* at 182*l*-183*l*), and committed the City to specific actions needed to encourage private developers to build such housing (*id.* at 182*l*-184*l*). In Section 17, the City expressly agreed to adopt legislation providing for development incentives such as zoning changes, tax abatements, and density bonuses, within 90 days after entry of the Decree (*id.*

at 184*l*).[6] In Section 18, the parties acknowledged that certain "subsidiary issues" relating to the Long Term Plan remained unresolved and agreed to work toward their resolution in a second consent decree by February 15, 1988 (*id.* at 184*l*-185*l*).

Faced with intense public opposition to the Consent Decree, the City sought to avoid compliance with it. On March 21, 1988, the City moved to modify the Decree. The City even promised to return nearly $30 million in federal funds if it were relieved of its duty to allow the development of public housing in white neighborhoods, a request that ignored the fact that the City had been found liable for intentionally segregating public and subsidized housing (Pet. App. 9a). The district court denied the City's motion on March 31, 1988. As a result, the City refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree, or to enact the legislation required by Section 17. *Id.* at 9a-10a.[7]

---

[6] The Consent Decree specifically provided (Pet. App. 182*l*) that

> [t]here shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

Additional measures that the parties agreed to forgo for a time included the use of City-owned land (*id.* at 183*l*).

[7] Undaunted by the district court's order, the City, on May 2, 1988, moved to vacate the Consent Decree in its entirety on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Consent Decree. The district court denied the motion. The City sought no further review of that ruling. See *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 859-861 (2d Cir. 1988) (88-856 Pet. App. 7k-9k, 12k n. 1), petition for cert. pending, No. 88-1029.

On June 13, 1988, the district court entered its Long Term Plan Order that resolved the issues left open by the Consent Decree and provided the detail for the legislation that Section 17 required. That Order was based upon a draft prepared by the City's attorneys before the City withdrew from negotiations. The court entered the order after the plaintiffs had submitted a joint motion and proposed order, the City had submitted comments, and the court had held a hearing. The Order accommodated most of the City's objections to the proposal (Pet. App. 9a-10a, 164k-177k).[8]

Yet the City continued its program of resistance. On June 21, nearly two months after the deadline set in the Consent Decree for the City's enactment of legislation necessary to implement the Long Term Plan (and more than two years after entry of the original Housing Remedy Order), the district court asked the Yonkers City Council to pass a resolution adopting the provisions of the Long Term Plan Order (Pet. App. 10a).[9] The Council refused and on June 28 actually defeated a resolution that would have required the City to honor its previous commitments

---

[8] The City challenged in the court of appeals only one substantive aspect of the Long Term Plan Order that concerned its state law authority to grant tax abatements (Pet. App. 31a). The court of appeals affirmed the entry of the Order (*id.* at 31a-32a). None of the petitioners challenges that aspect of the court of appeals' decision here.

[9] The court's request was not merely the result of the City's default in its Long Term Plan obligations under the Consent Decree. On June 14, the day after this Court denied the City's petition for a writ of certiorari to review the court of appeals' affirmance of the district court's liability and remedy orders (No. 87-1686 (June 13, 1988)), the City Council passed a resolution declaring a moratorium on all public housing construction in Yonkers—an unabashed defiance of the district court's Housing Remedy Order and the Consent Decree. Pet. App. 10a.

to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order. On July 11, the City told the district court that it would not voluntarily comply with the Consent Decree (although it had earlier approved that Decree) and, in trying to shirk all of its responsibilities, suggested that the court simply enact the Long Term Plan legislation itself (*ibid.*).

3. On July 26, 1988, the district court entered an order, proposed by the United States, that required the City, no later than August 1, 1988, to enact the legislation (known as the Affordable Housing Ordinance) required by Section 17 of the Consent Decree, and as set forth in the Long Term Plan Order (Pet. App. 160j-163j).[10] The July 26 Order also scheduled a hearing for August 2, at which time the City and individual members of the City Council who had voted against the Ordinance would be required to show cause why each should not be held in civil contempt if the Affordable Housing Ordinance were not enacted. The Order established the sanctions for such contempt: the City would be fined at a base rate of $100 for the first day and the fine would double for each day of noncompliance thereafter; the Council members would be fined $500 per day and imprisoned after 10 days of continued defiance. All contempt sanctions would end if and when the City enacted the legislation. *Id.* at 161j-162j.[11] By letter dated July 28, in response to the City's concerns that state law required notice and public hearing before the City Council voted on the Ordinance, the district court made clear that the July 26 Order would be satisfied if the

---

[10] Consultants retained by the City had drafted the Affordable Housing Ordinance, based upon the terms of the Consent Decree and the Long Term Plan Order (Pet. App. 11a).

[11] All fines would be paid into the Treasury of the United States and would not be refundable (Pet. App. 162j).

City Council passed a resolution committing the City to enact the Ordinance after state law requirements had been met (*id.* at 12a, 159i). All petitioners had notice of the court's July 26 Order and its July 28 letter (*id.* at 18a).[12]

On August 1, by a vote of four to three, the City Council defeated a resolution declaring the City's intent to adopt the Affordable Housing Ordinance. Petitioners, City Council members Spallone, Longo, Fagan, and Chema, voted against the resolution (Pet. App. 12a, 134h).[13] The district court therefore held show cause hearings on August 2 and 4 (*id.* at 115h-158h, 75g-99g). Finding that their refusal to comply with the Consent Decree was "but the latest of a series of contempts" (*id.* at 130h), the district court adjudged the City and the four Council members in civil contempt and imposed sanctions in accordance with the July 26 Order.[14]

---

[12] Before entering the July 26 Order, the district court had considered but rejected a proposal to create an "Affordable Housing Commission" to take over the City Council's powers and responsibilities under the court's various remedial orders. The City, speaking as usual on behalf of the City Council, opposed creation of the Commission on the ground that it would have divested the Council of its "core legislative as well as executive functions" (Pet. App. 11a; City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988)). The United States also opposed the proposal, arguing that the City itself should be required to comply with its obligations and be held accountable for its failure to do so. See Comments of the United States 4-6 (July 22, 1988).

[13] At its August 1 meeting, the City Council scheduled for August 15 a public hearing on the Affordable Housing Ordinance, as required by state law. Following the August 15 hearing, the City Council again rejected the Ordinance by vote of four to three. Pet. App. 13a, 16a-17a.

[14] In response to the Council members' contentions that they had an inadequate time to prepare for the hearing, the court allowed each of them until August 5 to request an evidentiary hearing, a hearing that

4. On August 9, the court of appeals stayed the contempt sanctions pending appeals by the City and the individual Council members (Pet. App. 68d-71e). On August 26, the court of appeals affirmed the adjudications of contempt against both the City and the Council members, but limited the fines against the City so that they would not exceed $1 million per day (Pet. App. 1a-35a). The court of appeals made clear that "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa" (*id.* at 30a), and concluded that neither the City nor the Council members could escape responsibility for their refusal to comply with the Consent Decree that the City Council itself had approved (*id.* at 28a, 30a-31a).

5. On September 1, this Court stayed the sanctions against the Council members pending timely filing and disposition of petitions for writs of certiorari, but denied the City's motion for a stay. *Spallone* v. *United States*, Nos. A-172, A-173, A-174, and A-175 (Sept. 1, 1988) (Pet. App. 57c).[15] On September 9, with the City's contempt sanctions approaching a fine of $1 million per day, the City Council finally enacted the Affordable Housing Ordinance (Pet. App. 36b, 203o-205o).[16]

---

would be held on August 8. The court ordered that all fines paid by the Council members would be held by the Clerk of the District Court until August 12, pending such a hearing. None of the Council members requested a hearing. Pet. App. 155h-156h.

[15] Justice Marshall, joined by Justice Brennan, dissented from the Court's stay of the sanctions against the Council members (Pet. App. 57c-67c).

[16] The City paid a total of approximately $820,000 in contempt fines. The Council member petitioners each paid $3,500 in such fines. Pet. App. 190n-200n.

ARGUMENT

The City of Yonkers, having been held liable for intentionally maintaining racially segregated public and subsidized housing, voluntarily agreed to undertake steps to remedy those substantial violations of the Equal Protection Clause and the Fair Housing Act. That commitment, specifically approved by the Yonkers City Council, was embodied in the Consent Decree entered by the district court after all parties, including the City of Yonkers, agreed to the terms. Reminiscent of the "fingerpointing" the Court saw earlier in this litigation between the City of Yonkers and the Yonkers Board of Education over the City's segregated schools,[17] the City of Yonkers here blames the Council for the protracted and wilful defiance of the federal court's lawful orders, while the individual Council members claim the privilege to renege on the commitment that the City of Yonkers and the Yonkers City Council previously gave to the court.

Both the district court and the court of appeals refused to recognize such a vacuum of governmental responsibility in the face of authoritative federal court orders designed to remedy racial discrimination in housing. The district court therefore imposed, and the court of appeals upheld, civil contempt sanctions to coerce the compliance that had long been overdue. That compliance is finally underway, the civil contempt sanctions have ended, and this litigation should not be unduly prolonged. The decisions below are correct. They do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Contrary to petitioners' sweeping suggestions (*e.g.*, 88-854 Pet. 14; 88-856 Pet. 7; 88-870 Pet. 10), this case does not present the question whether the district court

---

[17] See U.S. Br. in Opp. 7-8, *Yonkers Bd. of Educ.* v. *United States*, Nos. 87-1632 and 87-1686.

could have issued or enforced an order requiring the City Council to enact legislation absent the Council's consent. The court imposed the contempt sanctions here only to compel compliance with the Consent Decree that the City Council had approved. The district court's order of July 26 simply required the City Council to honor a commitment it had already voluntarily undertaken; the narrow question presented is thus whether the district court properly exercised its power to enforce compliance with that order.[18]

Despite the City Council's express endorsement of the Consent Decree, the Council member petitioners contend (88-854 Pet. 15-21; 88-856 Pet. 11-17; 88-870 Pet. 10-16) that the doctrine of legislative immunity absolves them from any obligation to comply with the district court's orders and shields them from sanctions for their decision to flout the Council's commitment to the court. In support of this broad proposition, petitioners rely principally on this Court's decisions holding state and regional legislators immune from liability in private actions brought under 42 U.S.C. 1983 for acts taken in their legislative capacities. *E.g., Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719 (1980); *Lake Country Estates, Inc.* v. *Tahoe*

---

[18] Indeed, throughout the remedial process, the district court gave the City and City Council every opportunity to design the Long Term Plan itself. Under the Housing Remedy Order, the City was to submit a proposed plan; the City refused to do so. Under the Consent Decree, the City was to continue negotiations to resolve certain subsidiary issues relating to the Long Term Plan; the City refused to do so. Finally, the Long Term Plan Order entered by the district court was based upon a draft prepared by the City and was revised after the City's comments in order to accommodate most of its objections. Under such circumstances, petitioners' suggestions (*e.g.*, 88-854 Pet. 9-12) that the district court's orders were an excessive use of judicial power are groundless.

Regional Planning Agency, 440 U.S. 391 (1979); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). As the court of appeals properly concluded, however, those decisions do not relieve the Council members of their duty to comply "with a consent judgment to which their city has agreed and which had been approved by their legislative body" (Pet. App. 28a). Since the context of the contempt proceedings here is thus far removed from the circumstances in which this Court has upheld claims of legislative immunity, application of that doctrine to insulate petitioners' actions is unwarranted.[19]

---

[19] In *Tenney* v. *Brandhove*, 341 U.S. 367, 379 (1951), for example, the Court held "only that [where] the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, * * * [42 U.S.C. 1983] does not create civil liability for such conduct."

Petitioners Spallone and Chema (88-854 Pet. 15; 88-856 Pet. 8) mistakenly suggest that the court of appeals' decision conflicts with those decisions holding that the doctrine of legislative immunity applies to local legislators. Although this Court has not resolved the question, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the courts of appeals have agreed that local legislators are immune from private actions brought under 42 U.S.C. 1983 that challenge their legislative decisions. See *Aitchison* v. *Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp.* v. *Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1193-1194 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce* v. *Riddle*, 631 F.2d 272, 274-279 (4th Cir. 1980); *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980). The court of appeals here assumed the correctness of those decisions (Pet. App. 25a), but recognized that this case presented a different question, namely, "whether * * * an order [requiring the enactment of legislation] may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's

This Court has made clear that "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. at 731; see *United States* v. *Gillock*, 445 U.S. 360, 369-373 (1980). That purpose is not implicated where, as here, the City Council had already voluntarily approved the Consent Decree. In that Decree, the City Council had agreed to enact legislation needed to implement the Long Term Plan. The district court's July 26 Order and the contempt sanctions that followed sought only to require the recalcitrant City and the Council members to honor that commitment. As this Court has emphasized, "all individuals, whatever their position in government, are subject to federal law." *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); see *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958). The City Council independently exercised its legislative function on January 27, 1988, when it specifically approved the Consent Decree. The district court did not interfere with that legislative decision by subsequently ordering the Council to comply with the Decree when it failed to do so voluntarily.

---

legislative body has voted in favor of such a consent decree" (*id.* at 27a); see also *id.* at 66c (Marshall, J., dissenting from grant of stay). Accordingly, this case is not the proper vehicle for addressing the issue left unresolved in *Lake Country Estates*—an issue that has not divided the courts of appeals—or broader issues of the proper scope of legislative immunity from actions for injunctive relief. See *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731-734 (1980); *Griffin* v. *County School Bd.*, 377 U.S. 218, 233 (1964) ("[T]he District Court may, if necessary to prevent further racial discrimination, require [county legislators] to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system * * *.").

Moreover, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity * * * [and] careful not to extend the scope of the protection further than its purposes require." *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. 5. The Court has thus hesitated to apply the doctrine of absolute immunity beyond the confines of *Tenney*, namely, "a civil action brought by a private plaintiff to vindicate private rights." *United States* v. *Gillock*, 445 U.S. at 372.[20] Here, in an action by the United States to vindicate the public interest in eradicating discrimination, the district court imposed contempt sanctions only to coerce compliance with its orders, not to preserve private rights. Any intrusion on the City Council's legislative process surely is minimal when the Council has already agreed to take the action required by the court. Moreover, the compelling public interest in the enforcement of federal court orders to remedy racial discrimination certainly outweighs any slight interference with the routine workings of the Council. See *United States* v. *Nixon*, 418 U.S. 683, 707, 708 (1974) (claims of absolute immunity and privilege must be balanced against "the role of the courts under Art. III" and "must be considered in light of our historic commitment to the rule of law"); *United States* v. *United Mine Workers*, 330 U.S. 258, 303 (1947) ("The interests of orderly government demand that respect and compliance be given to orders issued by courts * * *.").

---

[20] For example, "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *'." *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).

At bottom, the Council member petitioners claim a privilege, under the guise of legislative immunity, to choose whether to comply with a federal court order that the City Council itself had earlier approved. This claim far exceeds the bounds of the doctrine of legislative immunity recognized by this Court, a doctrine that seeks to promote independent and effective decisionmaking by legislators. That rationale for immunity cannot properly be extended to allow open defiance of a federal court decree, where the legislature has already consented to the entry of that decree as an appropriate remedy for discrimination.[21]

---

[21] Petitioners Spallone and Chema also contend (88-854 Pet. 18-21; 88-856 Pet. 20-23) that they are not bound by the Consent Decree because they voted against it. As officers of the City of Yonkers (see N.Y. Pub. Off. Law § 2 (McKinney 1952)), individual Council members are bound by the Consent Decree, whether they personally agreed to it or not. Fed. R. Civ. P. 65(d); see *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 13-14 (1945). As the court of appeals stated, if a Council member is unwilling to abide by the decree, "his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them" (Pet. App. 28a).

The Council member petitioners, not joined by the City, attack the Consent Decree itself as the source of their obligation to adhere to the district court's orders. Petitioners did not raise those arguments before the court of appeals, and they have therefore not preserved those issues for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, each of these belately raised points is without merit and calls for no further review.

Contrary to the contentions of petitioners Chema, Longo, and Fagan (88-856 Pet. 4, 23-25; 88-870 Pet. 13), nothing in the Affordable Housing Ordinance contradicts the Consent Decree's proviso requiring only zoning changes that "are not substantially inconsistent with the character of the area" (Pet. App. 184*l*). Indeed, Article V of the Ordinance expressly requires that "the provisions of the underlying

zoning • • • [and] the impact of development on surrounding land uses and neighborhoods" be taken into account before allowing "[d]epartures from [existing] zoning regulations" (Pet. App. 229r).

Citing *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) (88-856 Pet. App. 1k-43k), petition for cert. pending, No. 88-1029, petitioner Spallone contends that "changed circumstances questioning the integrity of the Consent Decree and the propriety of the proposed legislation" justified his refusal to comply with the Decree (88-854 Pet. 21-22). *Yonkers Racing Corp.* involved challenges by two property owners (Yonkers Racing Corp. and St. Joseph's Seminary and College) to the City's condemnation of their land for use as public housing sites under the Consent Decree. After examining the circumstances surrounding the adoption of the Decree, the court of appeals upheld the condemnation of the site owned by Yonkers Racing (88-856 Pet. App. 20k-26k, 36k). Turning to the Seminary's site, however, the court of appeals remanded for further factfinding on the Seminary's First Amendment claims (*id.* at 26k-36k). The court of appeals neither questioned the integrity of the Consent Decree nor addressed the propriety of the proposed legislation at issue here. On the contrary, the court of appeals commended "[t]he patience exhibited by the district court under enormously trying circumstances" and urged the implementation of the Housing Remedy Order "as quickly, and hopefully as smoothly, as possible" (*id.* at 36k). Petitioner Spallone's contention is therefore baseless.

Finally, petitioner Chema (88-856 Pet. 20-22) argues that the Consent Decree may not bind the City and the City Council because the City agreed to it only after the court threatened to impose sanctions. That claim is simply wrong. In January 1988, when the City Council approved the Consent Decree, the City had been in default of its obligations under the Housing Remedy Order for more than a year and a half. The district court did indeed threaten to impose contempt sanctions on the City, not for its failure to enter into a consent decree, but only for its continued refusal to comply with the Housing Remedy Order. See 88-856 Pet. App. 6k, 8m-17m. The district court's threat to impose sanctions for the City's continued defiance could only be expected. Rather than undermining the validity of the Consent Decree ultimately approved, as petitioner Chema would suppose, the need for such threats simply highlights the longevity and extent of the City's contumacious behavior and the ultimate necessity for the sanctions at issue here.

2. Petitioners Spallone and Chema contend (88-854 Pet. 21; 88-856 Pet. 9-11) that the district court erred in imposing civil contempt sanctions to require them to comply with the Consent Decree. In their view, the district court should have either enacted the legislation itself or appointed a commission to do so.[22] A federal court has "inherent power to force compliance with [its] lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966); see *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) ("a financial penalty may be the most effective means of insuring compliance"). While having alternative means of enforcement (see, *e.g.*, Fed. R. Civ. p. 70), a district court may exercise discretion in determining which sanctions will best "bring[] about the result desired." *United States* v. *United Mine Workers*, 330 U.S. at 304; cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (courts have broad discretion in designing remedies for constitutional violations).

Moreover, as the court of appeals acknowledged (Pet. App. 20a-21a), in imposing contempt sanctions a court

---

[22] This argument contradicts the position the City Council had taken before the district court. In opposing the proposed commission, the City, speaking on behalf of the City Council, stated:

> [T]he City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. * * * As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

City of Yonkers Comments With Regard To The Proposed Yonkers Affordable Commission 2 (July 25, 1988). Of course, enactment of the legislation by the court, as urged by the City in the district court and by the Council members here, would also have "divest[ed] the Council of specific state law powers."

must use " '[t]he least possible power adequate to the end proposed.' " *Shillitani* v. *United States*, 384 U.S. at 371 (citations omitted).[23] Here, the "end proposed" was the City Council's enactment of legislation, a step the City had expressly agreed to in the Consent Decree. Under the circumstances, either the court's enactment of the legislation itself, or its appointment of a commission to carry out the City Council's responsibilities under the Decree, would have been a greater, not a lesser, exercise of judicial power. See Pet. App. 64c (Marshall, J., dissenting from grant of stay) ("Surely it is both less disruptive and more effective to order compliance * * * than to usurp completely the Council's legislative authority and enact the legislation directly."). And enactment by the court or by an independent commission would not have achieved the essential goal of forcing the City to "recognize its obligation to conform to the laws of the land" by complying with the court's order (Pet. App. 121h). Accordingly, the district court did not abuse its discretion in imposing civil contempt sanctions.

3. Petitioner Chema contends (88-856 Pet. 17-20) that the district court violated his First Amendment right to free speech in ordering him to vote for the legislation, which the Council had earlier approved, and sanctioning him for his refusal to do so. No decision of this Court ex-

---

[23] In *Shillitani*, for example, this limitation required the district court to consider civil contempt before criminal contempt (384 U.S. at 371 n.9), and allowed the court to imprison the contemnors, who had refused to testify before the grand jury, only for the life of that grand jury (*id.* at 371-372). That caveat did not limit the court's authority in the first instance to select civil contempt as the proper remedy to coerce compliance with its orders (*id.* at 370).

amining the individual rights of federal or state legislators has considered as protected speech a legislator's act of voting in his official capacity. Rather, the Court has looked to other constitutional principles in resolving individual legislators' challenges to constraints on their activities. See, *e.g.*, *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. at 402-405 (doctrine of legislative immunity); *Gravel* v. *United States*, 408 U.S. 606 (1972) (Speech or Debate Clause); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (Speech or Debate Clause and doctrine of legislative immunity); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (separation of powers principle). To the extent that the First Amendment could even apply to a legislator's act of voting in his official capacity, petitioner Chema could not claim such protection here, where the legislative body to which he belongs, the City Council, had already committed itself to enact the legislation under the terms of the Consent Decree.[24] As the court of appeals recognized, whatever freedom individual Council members may have to express their views, that freedom "does not permit them to take action in violation of [the] law" (Pet. App. 28a). If petitioner Chema could not reconcile his obligation as a city official with his individual views, his recourse was to resign, not to defy the law.

---

[24] Only two federal court decisions have been found suggesting that the First Amendment has any application to a legislator's act of voting. In *Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the district court granted a preliminary injunction against enforcement of a city council ordinance requiring each member to vote "aye" or "no" on every resolution (or face censure or fines). In concluding that the plaintiff council member had "a reasonable likelihood of success on the merits of her free speech claim," the court emphasized that under the council's procedures, a vote of "no" was functionally indistinguishable from an abstention, and thus no discernible purpose was served by requiring a "no" vote instead of an abstention (*id.* at

4. Petitioner Chema also asserts (88-856 Pet. 25-26) that the district court violated the Due Process Clause in holding him in contempt. The district court's July 26 Order, as modified by the July 28 letter, clearly explained Chema's duty to honor the commitment to enact legislation as required by the Consent Decree, notified Chema that the court would require him to show cause why he should not be held in contempt should he refuse to honor that commitment, and set forth the contempt sanctions to be imposed. See Pet. App. 160j-163j, 159i. At the August 2 hearing, Chema admitted to the district court that he had received notice of the July 26 Order and that he had voted against the legislation (*id.* at 157h). Thus, there was no need for the government to prove those stipulated facts, and the district court needed no additional facts in order to find Chema in contempt. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Chema also ap-

---

668-669). We do not agree with the *Wrzeski* rationale, but in any event the present case is clearly different: a "no" vote (and similarly, an abstention) by a Council member constitutes official defiance of a federal court order based on the Council's own consent to the entry of a decree. Thus the purpose of subjecting a "no" vote to the sanction of contempt is manifest.

In *Clarke* v. *United States*, No. 88-3190 (D.D.C. Dec. 13, 1988), appeal pending, No. 88-5439 (D.C. Cir.), the district court held that the "Armstrong Amendment" (Tit. I, § 145 of the District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269), which conditioned the appropriation of funds to the District of Columbia on the District of Columbia City Council's modification of its law, placed "an unjustified burden on the first amendment rights" of the City Council members (slip op. 18). We disagree strongly with this opinion, and are in the process of appealing from the judgment. But the case, once again, is very different; indeed, the district court in *Clarke* itself distinguished the present case on the basis of the "compelling and public interest in obtaining compliance with federal court orders" (slip op. 9-10), as well as the existence of "the Council's own prior agreement to a consent decree" (*id.* at 10. n.6).

peared with his attorney at the August 2 show cause hearing and the district court gave him the opportunity to request an additional evidentiary hearing (Pet. App. 156h-157h); Chema made no such request (*id.* at 19a).[25] Accordingly, the court of appeals correctly concluded (*id.* at 17a-19a) that the district court's procedures in holding Chema in contempt were consistent with the Due Process Clause.

5. Petitioner City of Yonkers contends (88-855 Pet. 9-13) that the district court erred in imposing civil contempt sanctions against the City to coerce its compliance with the court's orders since only the City Council had the power to enact the legislation. The district court and the court of appeals correctly rejected this argument, which neither law nor common sense supports. Like all municipal corporations, the City of Yonkers functions through its governing bodies, and the official actions of the governing bodies constitute actions of the City. See *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 481 (1986).[26] Indeed, the responsibility of any corporation for the actions of its governing body is a fundamental tenet of our jurisprudence. Such entities are not exempt from legal accountability because they can act only through their representatives.

---

[25] Despite Chema's blanket assertion, such a hearing would not have been "a mockery of justice" (88-856 Pet. 26). The Council members' checks in payment of their fines were to be held by the Clerk of the District Court until August 12 (Pet. App. 157h). Thus, had Chema been able to show cause at any later hearing why he should not have been held in contempt, the adjudication of contempt could have been vacated and his money returned.

[26] Furthermore, the court of appeals found that, as of the time of oral argument before that court, the City had not done all it could to obtain compliance with the district court's orders (Pet. App. 29a).

Moreover, the record belies the City's contention (88-855 Pet. 11) that it was unable to comply with the court's orders. The City Council did enact the legislation when the coercive effect of the fines against the City *alone* (that is, while the imposition of fines against the Council members had been stayed by this Court) became too strong to withstand. In short, the contempt adjudication against the City accomplished the limited goal the district court intended, by making continued refusals to comply with the court's orders an unacceptably costly course of action for the City to follow.

6. Finally, the City contends (88-855 Pet. 13-22) that the district court's imposition of escalating fines for the City's civil contempt violates the Excessive Fines Clause of the Eighth Amendment. This Court has stated that the Eighth Amendment was designed to apply to the "criminal-law function of government," *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), and has ruled that the Amendment does not prohibit "the exercise of the traditional remedy of contempt to secure compliance [with court orders]," *Uphaus* v. *Wyman*, 360 U.S. 72, 82 (1959) (coercive imprisonment did not violate the Cruel and Unusual Punishment Clause). Although the Court has granted certiorari to consider whether the Excessive Fines Clause applies to awards of punitive damages in civil cases, *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, No. 88-556 (Dec. 5, 1988), such an extension of the Eighth Amendment would not reach civil contempt sanctions. Unlike punitive damage awards, the City's contempt fines were imposed not to punish, but, as in *Uphaus*, to coerce compliance with the court's orders (Pet. App. 32a-34a). The City thus could avoid its burden at any time simply by complying. Indeed, the City did comply without having the fines reach the outer limit of $1 million per day.[27]

[27] Nor is there any objective indication that the imposition of allegedly burdensome civil contempt sanctions is an important public

In any event, even were the Excessive Fines Clause applied here, the City's payment of roughly $820,000 in contempt fines would fall within constitutional bounds. The Eighth Amendment requires that criminal penalties be proportionate to the crime committed; and in determining proportionality, the sentencing court considers the gravity of the offense and the harshness of the penalty, and compares sentences imposed in cases in the same and other jurisdictions. *Solem* v. *Helm*, 463 U.S. 277, 284-292 (1983).[28] And in reviewing sentences, the appellate court must give deference to the discretion of the trial court. *Id.* at 290. Such standards are similar to those governing the propriety of civil contempt sanctions. See *United States* v. *United Mine Workers*, 330 U.S. at 304 (in exercising its discretion, district court "must • • • consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired" (footnote omitted)).

The court of appeals here measured the fines the City potentially faced against the standards outlined above, taking into account the level of fines imposed in other cases,[29] the City's annual budget of $337 million, and the

---

issue that merits this Court's attention. None of the public policy issues surrounding the controversy over punitive damages applies in the context of civil contempt sanctions. See *Bankers Life & Casualty Co.* v. *Crenshaw*, No. 85-1765 (May 16, 1988), slip op. 7-8; *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-829 (1986).

[28] *Solem* applied the Cruel and Unusual Punishment Clause, but held that the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments • • •." 463 U.S. at 289 (citation and internal quotations omitted). Thus, the standards set forth in *Solem* would appear to apply to the Excessive Fines Clause.

[29] The court of appeals observed that this Court, in *United States* v. *United Mine Workers*, 330 U.S. 258, 305 (1947), "selected as an ap-

City's willingness to refund nearly $30 million in federal funds in order to avoid its obligations under another part of the Consent Decree. The court of appeals concluded that the fines imposed by the district court were necessary to compel compliance and excessive only to the extent that they would continue to double beyond $1 million per day. Pet. App. 33a-34a. Accordingly, the court of appeals correctly held that the imposition of escalating fines for the City's civil contempt (which actually reached $820,000) was not excessive. That holding does not warrant further review by this Court and the petition should not be held pending the resolution of *Browning-Ferris Indus.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
DAVID K. FLYNN
LINDA F. THOME
Attorneys

FEBRUARY 1989

---

propriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days" (Pet. App. 33a).

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00072

(5)

No. 88-856

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

JAMES D. HARMON, JR.
Counsel of Record
BOWER & GARDNER
110 East 59th Street
New York, New York 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

46p

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
A. The Contempt Power Was Not Exercised To Enforce Any Commitment Made By Councilman Chema	1
B. The Majority Vote In Favor Of The Consent Decree Did Not Require Councilman Chema To Vote As Directed By The July 26, 1988 Order	3
C. The July 26, 1988 Order And The Contempt Judgment Violated Councilman Chema's First Amendment Rights	4
D. The Legislative Immunity Doctrine Is Not Limited To Private Damage Actions	8
CONCLUSION	9
SUPPLEMENTAL APPENDIX	
EXHIBIT S—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 2, 1988, Adjudicating Councilman Chema in Civil Contempt	1s
EXHIBIT T—Councilman Chema's Notice of Appeal of Judge Sand's July 26, 1988 Order	1t
EXHIBIT U—Councilman Chema's Notice of Appeal of Judge Sand's August 2, 1988 Order	1u
EXHIBIT V—Transcript of Hearing Held July 12, 1988	1v
EXHIBIT W—"City of Yonkers' Comments With Regard to the Proposed Yonkers Affordable Housing Commission"	1w

TABLE OF AUTHORITIES

Page

Cases

Bond v. *Floyd*, 385 U.S. 116 (1966) 5

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5

Clarke v. *United States*, No. 88-3190, slip op. (D.D.C. Dec. 13, 1988) 8

Democratic Party of The United States v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) 5

Fletcher v. *Peck*, 6 Cranch 87 (1810) 3

Forrester v. *White*, 484 U.S. ___, 56 U.S.L.W. 4067 (Jan. 12, 1988) 8

Freeman v. *Lamb*, 33 A.D.2d 331, 308 N.Y.S.2d 580 (4th Dep't 1970) 4

Gravel v. *United States*, 408 U.S. 606 (1972) 9

Hoellen v. *Annunzio*, 348 F. Supp. 305 (N.D. Ill. 1972), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973) 2

Kilbourn v. *Thompson*, 103 U.S. 168 (1881) 8

Local Number 93, International Assoc. of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986) 2

Marin v. *Foster*, 45 N.Y.2d 287, 408 N.Y.S.2d 387, 380 N.E.2d 217 (1978) 4

Meyer v. *Grant*, ___ U.S. ___, 108 S. Ct. 1886 (1988) 7

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 7

Pacific Gas & Electric Co. v. *Public Utilities Commission*, 475 U.S. 1 (1986) 7

Page

People ex rel. Devery v. *Coler*, 173 N.Y. 103, 110, 64 N.E. 956 (1903) 4

Powell v. *McCormack*, 395 U.S. 486 (1969) 5, 8

Reynolds v. *Sims*, 377 U.S. 533 (1964) 5

Riley v. *National Federation of the Blind*, ___ U.S. ___, 108 S. Ct. 2667 (1988) 7

Roth v. *United States*, 354 U.S. 476 (1957) 5

Spence v. *Washington*, 418 U.S. 405 (1974) 4

Star Distributors, Ltd. v. *Marino*, 613 F.2d 4 (2d Cir. 1980) 2

Supreme Court of Virginia v. *Consumer Union*, 446 U.S. 719 (1980) 8

Tashjian v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) 5

Tenney v. *Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951) 8, 9

Tinker v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) 5

United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, ___ U.S. ___, 108 S. Ct. 2268 (1988) 9

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1978) 3

United States v. *Baird*, 241 F.2d 170 (2d Cir. 1957) 9

United States v. *Thompson*, 319 F.2d 665 (2d Cir. 1963) ... 9

Wooley v. *Maynard*, 430 U.S. 705 (1977) 5

Wrzeski v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) 4, 6

Page

Yonkers Racing Corp. v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988) 2

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

Statutes, Regulations and Rules

42 U.S.C. § 1983 ..... 1, 9

Fed. R. Civ. P. 65(d) 2

Other Authority

Alexander Hamilton, 2 *Debates on the Federal Constitution* 257 8

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in 8 *Works of Thomas Jefferson*, 322 6

INTRODUCTION

The fundamental issue presented by this petition is whether a federal district court, in choosing a remedial measure to vindicate the constitutional rights of certain citizens, may infringe the fundamental constitutional rights of another citizen, when the constitutional rights of both can be accommodated simultaneously by the use of measures which do not unnecessarily intrude upon the constitutional rights of the latter citizen.

The position of the Government and the NAACP requires that the individual constitutional rights and privileges of Yonkers City Councilman Peter Chema, and his immunity as a legislator, be needlessly sacrificed.

In asking this Court to deny certiorari and not review the important constitutional questions raised in this case, the Government and the NAACP would leave the resolution of basic issues going to the core of our system of shared power to rest upon faulty premises and flawed conclusions, to wit: that the contempt power was used merely to enforce a commitment made by Chema or on his behalf; that the act of casting a legislative vote is not a form of speech protected by the First Amendment; that the doctrine of legislative immunity protects a local legislator only against private damage actions under 42 U.S.C. § 1983 but not against the imposition of contempt sanctions for the manner in which he casts his legislative vote; that the balance this Court must strike is between the governmental interest in enforcing court orders vindicating Fourteenth Amendment rights on the one hand and the integrity of the Yonkers City Council's legislative process on the other; and that a constitutionally acceptable price to pay for the exercise of a local legislator's constitutional rights is relinquishment of office and the corresponding nullification of his constituents' right to elect their representative. As we will show, each of these conclusions is incorrect.

ARGUMENT

A. The Contempt Power Was Not Exercised To Enforce Any Commitment Made By Councilman Chema.

The pervasive error in the argument of the Government and the NAACP is the premise that the contempt power was used

merely to enforce a promise allegedly made or a commitment "voluntarily undertaken",[1] Government Brief, p. 12, NAACP Brief, p. 13, and that Councilman Chema was bound by the Decree, notwithstanding his vote against it. The District Court issued the contempt citation explicitly to enforce its July 26, 1988 order, which sought to compel Councilman Chema to vote in a specific way on a specific ordinance, Appendix pp. 13c, 19c, 26c, 33c, 37c, 2g and 2u, something Councilman Chema had never agreed to do.

There is no dispute that Councilman Chema voted against the Decree when the Council was asked to approve it in January 1988. Appendix p. 34c. There was no consent, no agreement, no meeting of the minds, and no commitment by Councilman Chema to vote for implementing legislation.[2]

The Government, the NAACP, the District Court and the Court of Appeals all incorrectly expand the Council majority's power to bind the City (which we concede) to include authority to bind individual council members with respect to future legislative acts.

---

[1] In an opinion filed about one month after its opinion challenged here, the Court of Appeals concluded that "... Yonkers entered into the Consent Decree ... only after being threatened by the district court with sanctions for contempt." *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988). The Government is wrong when it denies linkage between the threat of contempt and the Council's approval of the Decree. Government Brief, p. 17 n.21.

[2] Assuming *arguendo*, that the contempt power was purportedly used to enforce the Decree, it is clear that the Decree could not be so enforced against Councilman Chema because "only the parties to the decree can be held in contempt of court for failure to comply with its terms." *Local Number 93, International Assoc. of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 530 (1986).

Contrary to the implication in the Government's Brief, p. 16, n. 21, elected legislators are not mere "officers" (*i.e.*, ministerial or merely executive functionaries) as is clearly contemplated by Fed. R. Civ. P. 65(d). No rule or procedure or, indeed, any rule of inherent judicial authority to enforce judgments, can impair fundamental constitutional rights and historic immunities. Thus, Fed. R. Civ. P. 65(d) does not alter the rule that legislators are not subject to injunctions for purely legislative acts. *See Star Distributors, Ltd.* v. *Marino*, 613 F.2d 4, 9 (2d Cir. 1980); *Hoellen* v. *Annunzio*, 348 F. Supp. 305, 314 (N.D. Ill. 1972), *aff'd*, 468 F.2d 522 (7th Cir. 1972), *cert. denied*, 412 U.S. 953 (1973).

Moreover, Fed. R. Civ. P. 65 (d), cited by the Government, applies to only injunctions and restraining orders, and not to judgments.

In any event, the Ordinance, which Chema was ordered to vote for, went beyond the terms agreed to by the majority of the Council in the Decree. The Ordinance denied the Council the right reserved to it by the Decree to exercise its own judgment with respect to quality of life factors before approving zoning changes which would affect any particular area.[3]

B. The Majority Vote In Favor Of The Consent Decree Did Not Require Councilman Chema To Vote As Directed By The July 26, 1988 Order.

Another error in the reasoning of the Government and the NAACP is the assumption that the vote of the majority of the Council to approve the Decree obligated the individual legislators constituting the minority who voted against it, to vote later to implement its terms.

The argument that a majority vote of a legislative body on one statute or resolution binds individual legislators to vote consistently with the original legislative act (explicitly made by the NAACP at pp. 13-16 of its Brief in Opposition, and implicitly by the Government at p.12 of its Brief) violates a fundamental principle of our representative government. A legislature, by enacting legislation, cannot deprive individual legislators of their right later to vote to change that legislation. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978).

Legislative bodies may not limit the unfettered discretion of their successors to consider legislation. "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810)

---

[3] The Decree reserved to the Council the right to consider the impact of any zoning change on the surrounding community. The Ordinance, on the other hand, gave that power to the Office of Implementation and the Yonkers Planning Board. The Council never agreed to give up its discretion. *Compare* Appendix p. 71 *with* Appendix p. 16-23p.

The Affordable Housing Ordinance amended Yonkers' existing zoning ordinance, Yonkers Code, *Zoning*, Chapter 107, Appendix 1p, and made substantive zoning changes to increase land use densities, for example, *Id.* at 3p, notwithstanding any provision of the existing zoning law to the contrary. *Id.* at *15p*.

(Marshall, J.). *See also Marin* v. *Foster*, 45 N.Y. 2d 287, 293, 408 N.Y.S. 2d 387, 390-91, 380 N.E. 2d 217 (1978) ("Elected officials must exercise legislative and governmental powers, within their own sound discretion, as the needs require. Ordinarily they may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired"); *People ex rel. Devery* v. *Coler*, 173 N.Y. 103, 110, 64 N.E. 956 (1903) ("Nothing is better settled in our jurisprudence [than] that one legislature cannot bind the hands or limit the power of subsequent legislatures"); *Freeman* v. *Lamb*, 33 A.D. 2d 331, 333, 308 N.Y.S. 2d 580, 582 (4th Dep't 1970) ("a retiring [City] Council may not legislate to limit the power of a successor Council to act"). *See also Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) (city ordinance requiring city council members to vote yea or nay on every resolution held invalid).

It is self-evident that a legislative majority cannot pass legislation which purports to bind the individual members of the minority to vote in a particular manner.

C. The July 26 Order And The Contempt Judgment Violated Councilman Chema's First Amendment Rights.

Neither the Government nor the NAACP has met the argument Councilman Chema made in his petition for certiorari that the District Court's July 26 order, which compelled Councilman Chema to vote in a particular way on a specific ordinance, violated his right of free speech. Rather, the Government patches together its disjointed arguments that legislative immunity should not apply and that the "City Council had already committed itself to enact the legislation under the terms of the Consent Decree," Government Brief, p. 20, to reach the *ipse dixit* conclusion that Councilman Chema had no right to express his dissent by voting "no". We have already dealt with the "prior commitment" branch of the argument, and shall discuss, *infra*, the legislative immunity issue. The First Amendment argument, however, stands on independent grounds.

It is well-settled that conduct, if sufficiently expressive, may be protected as free speech under the First Amendment. *See, e.g., Spence* v. *Washington*, 418 U.S. 405 (1974) (displaying the flag

with a peace symbol attached is protected); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (wearing armbands); *Wooley* v. *Maynard*, 430 U.S. 705 (1977) (state's motto on license plate is speech, and right *not* to display motto and thus not to speak is protected).

Councilman Chema's vote concerned an important public issue, and the message Councilman Chema conveyed by his vote was "core political speech." The First Amendment "affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes...'" *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976), *quoting Roth* v. *United States*, 354 U.S. 476, 484 (1957). As this Court pointed out in *Bond* v. *Floyd*, 385 U.S. 116 (1966), the First Amendment protects the most important function of legislators—the ability to freely discuss their views:

> [The government has] no interest in limiting... legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.

Id., at 135-36 (footnote omitted).

This "latitude" must include the right to vote freely. Without protection to vote as their consciences dictate, legislators would be unable to fulfill their duty to their constituents. Curtailment of a legislator's right to vote as he wishes interferes with the protected relationship between a legislator and his constituents, and deprives not only the legislator, but also the electorate, of their fundamental constitutional right to vote. *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of The United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Powell* v. *McCormack*, 395 U.S. 486, 527 (1969); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). As Jefferson and Madison wrote 190 years ago:

> ... for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other... is to put the legislative de-

> partment under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business. . .

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in 8 *Works of Thomas Jefferson*, 322-23, 325-27.

Likewise, the Government's contention that a legislator loses his First Amendment rights when he enters office (Government Brief, pp. 19-20) is wrong. The sole reason advanced for this absurd proposition is that, in the cases heretofore decided by this Court involving attempts to constrain the speech of legislators, the Court relied upon other constitutional principles to uphold the legislator's right to vote.[4] However, there is no basis in logic or law for the Government's contention that a legislator is stripped of his fundamental right of free speech when he engages in his legislative activities. "Plaintiff's status as a legislator does not strip [him] of any rights [he] would otherwise enjoy under the First Amendment to speak freely or to speak not at all." *Wrzeski* v. *City of Madison*, 538 F. Supp. at 667.[5] Indeed, as is shown above, the position of a legislator as a spokesman for the electorate, as well as for himself, enhances the already compelling rationale for the constitutional protection of legislative free speech.

The Government also argues that Councilman Chema's individual First Amendment right of free speech was somehow overruled by the Council's commitment to enact legislation. Government Brief, p. 20. Such a "waiver" not only violates the fundamental principles of legislative prerogative (*see supra* at 3), but also would indirectly constitute a deprivation of Councilman

---

[4] We agree, of course, with the Government that should the Court rule that Councilman Chema was cloaked with legislative immunity, it may not need to reach the First Amendment issue.

[5] The action challenged in *Wrzeski* was a city ordinance that purported to compel city council members to vote "yes" or "no" on proposed legislation, and to prohibit them from abstaining. The July 26 Order was still more repugnant, because it purported to compel him to vote yes, and even abstention would subject him to contempt sanctions.

Chema's First Amendment rights by the majority of the City Council. That, clearly, is at odds with the fundamental and overriding constitutionally protected right of free speech.

Because the speech involved in this case is "core political speech", the burden on the Government to justify its limitation or, in this case, abolition, is "well-nigh insurmountable." *Meyer* v. *Grant*, _U.S. _, 108 S. Ct. 1886, 1894 (1988). The conflict between the governmental interest and Chema's individual rights in this case is not between the governmental interest in having lawful court orders or judgments implemented on the one hand, and the integrity of the Council's legislation process on the other (both of which are legitimate ends). Rather, it is between the *means* used by the District Court to compel a legislative act—which is speech, and using the contempt power to coerce that act, and Chema's First Amendment rights and legislative immunity privilege.

As Councilman Chema demonstrated in his petition for certiorari (Petition at 9-11), the District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the long-term plan. Rather, the District Court had at its disposal means far less intrusive[6] upon Chema's individual rights[7] than a dictated vote backed up by the contempt power and its possible deprivation of Chema's liberty and property.

The argument that Councilman Chema could retain his First Amendment right by voting "Yes" while saying that he did not really favor the Ordinance is constitutionally unacceptable. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co.* v. *Public Utilities Commission*, 475 U.S. 1 (1986); *Riley* v. *National Federation of the Blind*, _U. S. _, 108 S. Ct. 2667 (1988). Officially imposed hypocrisy cannot be sanc-

---

[6] The City Council advised the District Court that it did not have the statutory authority to consent to the appointment of an affordable housing commission, but the Council did not oppose the creation of a commission, as the Government suggests. *See* Government Brief, p. 18, n. 22. The Council stated, "[T]here is little doubt that the City Council would lack the power to delegate those functions to a commission which is not popularly elected. . ." Appendix p. 2w; *see also* 3c, 13-14n.

[7] The Government misses the mark when it speaks of minimal "intrusion on the City Council's legislative process" and "slight interference with the routine working of the Council." Government Brief, p. 15. The issue raised by this petition is the unnecessary sacrifice of Councilman Chema's *individual* constitutional rights and legislative immunity.

tioned by this Court; the very notion is unworthy of the heirs of Hamilton, Madison and Jefferson. The ambiguous message a "yes" vote and contrary words would convey would give rise to the belief that Councilman Chema had failed to act on his beliefs and convictions, and had changed his theretofore consistent view. *See Clarke* v. *United States*, No. 88-3190, slip op. at 7 (D.D.C. Dec. 13, 1988).

To the extent the Government contends that Councilman Chema's "recourse was to resign," Government Brief p. 20, resignation is a constitutionally impermissible price for a legislator to have to pay for the exercise of his constitutional rights, because it violates "[T]he true principle of a republic. . . that the people choose whom they please to govern them." Alexander Hamilton, 2 *Debates on the Federal Constitution* 257, *cited in Powell* v. *McCormack*, 395 U.S. 486, 527 (1969).

D. The Legislative Immunity Doctrine Is Not Limited To Private Damage Actions.

Contrary to the Government's suggestion that Councilman Chema's legislative immunity claim "far exceeds the bounds of the doctrine," Government Brief, p. 16, the application of legislative immunity here would be totally consistent with, and within the confines of, the doctrine as set forth in *Tenney* v. *Brandhove*, 341 U. S. 367, *reh'g denied*, 342 U.S. 843 (1951). As the Government concedes, Government Brief, p. 14, "[t]he purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Virginia* v. *Consumer Union*, 446 U.S. 719, 731 (1980). The independent performance of the legislative function is here ensured by affording Councilman Chema legislative immunity for his debate and vote, as dictated by his conscience, on the political, economic and social issues affecting his constituency. As stated by this Court in *Forrester* v. *White*, 484 U.S.__, 56 U.S.L.W. 4067, 4069 (Jan. 12, 1988), "immunity is justified and defined by the functions it protects and serves. . . ." Immunity is plainly justified here because Councilman Chema was exercising a purely legislative function.

Further, the Government's attempt to argue the inapplicability of legislative immunity by noting that *Tenney*, and subse-

quent cases, involved private actions under 42 U.S.C. § 1983, is not persuasive. First, before and after *Tenney*, this Court has applied the principle of legislative immunity in cases not arising under Section 1983. *See, e.g., Gravel* v. *United States*, 408 U.S. 606 (1972); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). Although the watershed case of *Tenney* involved a private damage action brought under 8 U.S.C. § 43, the predecessor statute to 42 U.S.C. § 1983, the rationale and reach of the Court's broad analysis was not in any manner confined by that circumstance. Indeed, the Court, in *Tenney*, traced the roots of "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" to the English parliamentary struggles of the 16th and 17th centuries, in which the doctrine of legislative immunity arose to protect members of Parliament from coercion by the executive. *Tenney* v. *Brandhove*, 341 U.S. at 372; *See also Gravel* v. *United States*, 408 U.S. at 616. In fact, this case, in which the Government vehemently urged the District Court to use the contempt power, is closely analogous.

CONCLUSION

The unprecedented response of the District Court to Councilman Chema's act of casting a legislative vote raises issues which merit review by this Court.[8] This case presents the core issue of whether those remedial measures can properly include an order by a district court directing a local legislator how to vote, or face jail if he were to vote otherwise.

Although the Government and the NAACP would have the Court view all of the petitioners without distinguishing among

---

[8] Contrary to the NAACP's assertion, Councilman Chema does contest the District Court's "authority to enter . . . the Order of July 26, 1988 . . ." NAACP brief, p. 24. Councilman Chema filed a timely notice of appeal of the July 26th order. Appendix p. 1s, and challenged its validity in the Court of Appeals. Court of Appeals Brief of Peter Chema, p. 2. He was the only Councilman to have done so. His right to challenge the underlying order is clear, *see United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, _U.S._, 108 S.Ct. 2268 (1988); *United States* v. *Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *United States* v. *Baird*, 241 F.2d 170, 172 (2d Cir. 1957), and was never questioned below. It was entirely appropriate for Councilman Chema, as a matter of "conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference* v. *Abortion Rights Mobilization Inc., supra.*

them, the facts and legal issues pertaining to Councilman Chema are different from those pertaining to the City as a defendant and certain of the other councilmen-petitioners. The principal arguments Councilman Chema makes, *i.e.*, that as a dissenter in the vote approving the Decree, he is not bound by the "commitment" of the majority; that he has legislative immunity from attempts to impose liability for casting his legislative vote; and that his right to vote his conscience is a right protected by the First Amendment, distinguish him from the City of Yonkers and from those councilmen who voted to enter into the Decree.

This is the right case in which to decide these issues. The opposing positions stand in stark opposition to one another, and there has been real damage to personal rights, freedoms and immunities in this case of great notoriety. Housing desegregation cases are also likely to give rise to these issues in the future.

The orders of the District Court frame the issues of individual rights in such a way that a decision by this Court would guide federal courts and local officials in similar situations. This Court should issue a writ of certiorari to review the case of Peter Chema.

Dated: New York, New York
February 23, 1989

Respectfully submitted,

BOWER & GARDNER
Attorneys for Councilman Chema

By : _____
JAMES D. HARMON, JR.
Counsel of Record
110 East 59th Street
New York, New York 10022
(212) 751-2900

Of Counsel:
Barry G. Saretsky
Martin S. Kaufman
Michael J. Eng
Aaron F. Fishbein

Supplemental Appendix

EXHIBIT S

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *et. al.*,

v.

Civil Action No.
80 Civ. 6761 (LBS)

YONKERS BOARD OF EDUCATION, *et. al.*,

ORDER

On July 26, 1988, this Court entered an order requiring the City of Yonkers to pass on or before August 1, 1988 the legislative package relating to the long-term plan as described in Section 17 of the first remedial consent decree in equity dated January 28, 1988 and the long-term plan order dated June 13, 1988 ("Affordable Housing Ordinance"). Following entry of that order, counsel for the City raised a number of questions as to the applicability of state law provisions relating to amendments to the City's zoning ordinance. Rather than deal with any question of federal preemption, this court notified counsel for the City and the plaintiffs by letter dated July 28, 1988 that compliance with its July 26th order could be met by adoption by the City Council of a resolution committing the City to enact the affordable housing ordinance within the time prescribed by notice pursuant to state law.

The July 26th order further provided that, upon the City's failure to enact the legislative package as required, the City and its individual City Council Members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1, 1988, the City Council, by a vote of 4-3, refused to adopt the required resolution. Members of the City Council voting against the resolution were identified as Vice-Mayor Henry Spallone, majority leader Nicholas Longo, Edward Fagan and Peter Chema.

At the hearing, the individual Council Members were called to appear and show cause why they should not be adjudged in civil contempt of the July 26th order.

Council Member Spallone advised that he had not yet obtained counsel, but desired to do so. Although this court believes that Mr. Spallone had adequate notice to retain counsel as of August 2nd, this court hereby adjourns the hearing on his possible contempt until 10:00 A.M., August 3, 1988, to assure his representation by counsel.

Council Members Longo, Chema and Fagan appeared with counsel. Each of those Council Members was given an opportunity to show cause why he should not be held in civil contempt of this Court's July 26, 1988 order. Having considered the arguments of all parties and the Council Members, this court finds as to Messrs. Longo, Chema and Fagan:

1. That each such Council Member received adequate notice as to his duty under the July 26th order;

2. At the hearing on August 2, 1988, each such Council Member had an opportunity to be heard;

3. That each such Council Member had the ability to comply and a full understanding of the consequences of his non-compliance; and

4. That each such Council Member receive adequate notice of the possible need to retain counsel prior to the August 2nd hearing and that any claim on their part of inadequate representation due to a lack of time to consult with counsel must fail. Any such delay in consultation must be attributed to the Council Members themselves and not to this court or the parties.

Accordingly, Messrs. Longo, Chema and Fagan are hereby adjudged to be personally in civil contempt of this court's July 26, 1988 order.

Therefore, it is hereby ORDERED that Messrs. Longo, Chema and Fagan:

1. Shall each be personally fined $500 per day every day until such time that he purges himself of contempt by voting to enact the affordable housing ordinance, or a resolution of intent to

adopt the same, or such time that the City has so acted. Payment of these fines shall proceed as set forth in paragraph 4 of this court's July 26, 1988 order. The first check is due and payable by 4:30 P.M. on August 3, 1988. Any such checks payable pursuant to this paragraph shall be held by the Clerk of the Court until August 12, 1988, preserving the Clerk's power to refund such payments should this court find reasons between now and August 12th to set aside these findings of contempt;

2. Any such Council Member who has not purged himself of civil contempt on or before August 10, 1988 shall be committed on August 11, 1988 to the custody of the United States Marshall until such time as the City enacts the legislation or until such individual Council Member purges himself of contempt. The contempt fines shall continue during any time of imprisonment.

It is further ORDERED that by 4:30 P.M. on August 5, 1988, counsel for Messrs. Spallone, Chema, Longo and Fagan shall advise this court in writing whether they desire a further evidentiary hearing in this matter. If such a hearing is desired, it will be held at 10:00 A.M., August 8, 1988.

It is further ORDERED that the applications of Messrs. Fagan and Longo for a stay of this order are denied.

SO ORDERED:

DATED: August 2, 1988
New York, New York

UNITED STATES DISTRICT JUDGE

EXHIBIT T

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,
Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from an order entered by District Judge Leonard B. Sand in this action on July 26, 1988.

Dated: New York, New York
August 10, 1988

BOWER & GARDNER

By: _____
Attorneys for Peter A. Chema
110 East 59th Street
New York, New York 10022
(212) 751-2900

TO: MICHAEL W. SCULNICK, Esq.
Vedder, Price, Kaufman, Kammholz & Day
Attorneys for City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017

BRIAN MEFFERNAN, Esq.
Attorney for Department of Justice
Civil Rights Division, Room 7525
United States Department of Justice
10 and Pennsylvania Avenues, N.W.
Washington, D.C. 20035-6998

EXHIBIT U

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,

Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from a judgment of civil contempt entered by District Judge Leonard B. Sand in this action on August 2, 1988.

Dated: New York, New York
August 4, 1988

BOWER & GARDNER

By: _____
Attorneys for Peter A. Chema
110 East 59th Street
New York, New York 10022
(212) 751-2900

TO: MICHAEL W. SCULNICK, Esq.
Vedder, Price, Kaufman, Kammholz & Day
Attorneys for City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017

BRIAN HEFFERNAN, Esq.
Attorney for Department of Justice
Civil Rights Division, Room 7525
United States Department of Justice
10 and Pennsylvania Avenues, N.W.
Washington, D.C. 20035-6998

MICHAEL H. SUSSMAN, Esq.
Sussman & Sussman
Attorneys for Plaintiff-Intervenors
Yonkers Branch National Association
for the Advancement of Colored People, et al.
30 S. Broadway
Yonkers, New York 10701

JOHN H. DUDLEY, Esq.
Butzel, Long, Gust, Klein & Van Zile
Attorneys for Defendant Yonkers Board of Education
1650 First National Bldg.
Detroit, Michigan 48226

RAYMOND LARIZZA, Esq.
Civil Division, Room 3724
United States Department of Justice
10th & Pennsylvania Avenues, N.W.
Washington, D.C. 20530

OSCAR NEWMAN
Institute for Community Design Analysis
66 Clover Drive
Great Neck, New York 11021

LAWRENCE R. SYKES, Esq.
Attorney for Councilmembers Longo & Fagan
20 South Broadway
Yonkers, New York 10701

VINCENT FONTANA, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker
Attorneys for Councilmember Spallone
420 Lexington Avenue, 22nd Floor
New York, New York 10170

EXHIBIT V

UNITED STATES OF AMERICA,

- against -

80 Civ. 6761 (LBS)

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

July 12, 1988
10:30 a.m.

(In open court)

THE COURT: Good morning. To begin on a positive note, I would like to read into the record a letter received by the court from Mr. Dudley, dated June 29.

"Dear Judge Sand:

"On behalf of Dr. Batista and the Board of Education I want to express to the court our appreciation for the characteristically effective efforts of Dr. Pastore in helping to resolve the recent budget dispute between the board and the city.

"His intervention was instrumental in making possible a solution that was mutually acceptable and I know that I express Mr. Sculnick's sentiments as well.

"Some with inconveniently long memories may recall that at the time of the school remedy hearings it was the school district, through its intrepid counsel, who objected to the appointment of a monitor as unnecessary, wasteful and intrusive, et cetera.

"The next time around I may want to rethink that position.

"Very truly yours,

"John H. Dudley, Jr."

A very gracious letter and I am sure much appreciated.

This court yesterday received a memorandum of law from the City of Yonkers which we deemed to be of sufficient impor-

tance so that we will mark it as Court Exhibit A of today's date so that it will become part of the record.

(Court Exhibit A marked)

THE COURT: It represents the court believes a significant statement by the City of Yonkers. The memorandum is in response to the joint application by the Department of Justice and the NAACP for an order directing the city council to take certain actions by certain specific dates.

The memorandum reads in pertinent part, page 3:

"The city urges the district court to avoid a situation where it is in the position of ordering the city council to adopt specific legislation with respect to the zoning ordinance and other necessary legislation required to implement the long-term plan. No purpose can be served at this point by ordering the city council to adopt the zoning legislation now being drafted.

"Instead the court should enter an order adopting the necessary changes or additions to the Yonkers zoning ordinance necessary to implement the long-term plan order.

"See United States v. Yonkers Board of Education, 837 Fed 2d, 1181, 1237, Second Circuit 1987."

Exterpolating now. It is a reference by the City of Yonkers, an invocation by the City of Yonkers of that portion of the decision of the Court of Appeals which affirmed the court's order directing that certain actions be deemed taken in the absence of action by the City Council.

Returning, then, to the city's memorandum:

"This is not a situation where the normal considerations of comity require this court to give the city an additional opportunity to adopt the specific legislation necessary to implement the long-term plan. The long-term plan order was entered by this court over the city's objection and now the city has indicated by the defeat of the resolution proposed by the court that it will not voluntarily adopt the legislation contemplated by that order.

"Under those circumstances there is no fruitful purpose to be served by directing the city to approve the legislation under

threat of contempt. All that is furthered is confrontation and the painful possibility of contempt and bankrupting fines.

"Similarly, with respect to Resolution No. 125, no helpful purpose can be served by directing the city council to withdraw it. The City Manager, Corporation Counsel and outside counsel to the City of Yonkers have all indicated that they will take no action in furtherance of the resolution. The resolution for all intents and purposes has no force and effect.

"If this court concludes that the resolution is inconsistent with prior orders of the court and the obligations imposed upon the city, then the court should declare the resolution null and void. Upon doing so there is no need for the council to withdraw."

Now, that memorandum received yesterday, plus a provision suggested in the order submitted on behalf of the Department of Justice and the NAACP, suggests that maybe a way of proceeding exists which will be more constructive, less confrontational than the present situation.

My reference to the proposed order is to the last paragraph which talks of the court taking other actions as necessary, including the possibility of relieving the City of Yonkers and/or the city council of functions previously reserved to it by the terms of the long-term remedy order and the consent decree of January 28, 1988 and creating and requiring the city to fund entities accountable to the court and with the power and authority to implement the outstanding housing remedies.

I am of the opinion, reinforced by the city's memorandum, that perhaps that time has come and that the court and the parties and the city council should realistically confront the situation which now obtains, a situation in which the city council adopts resolutions which are recognized as being indefensible.

I would suggest—

Let me make one preliminary comment. The suggestion by the city that rather than directing the city council to do things, the court act has two problems.

The first problem is that this court is not eager to assume any greater role than the circumstances require, not out of a lack of

interest, concern or power but rather a concept of what the proper role of a federal court is in a circumstance such as this.

Second, the suggestion by the city that the matter be dealt with by court action rather than by city council action is a useful and productive procedure provided that there is no necessity at any stage to return to the city council.

Obviously, if the city council were to say, well, Judge Sand, those are your orders, you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built.

With that by way of background, I would invite the consideration and comments of the parties to the following:

That there be created by an order of this court an entity, the Yonkers Affordable Housing Commission, to be comprised of the following persons:

The city manager of Yonkers or his designee, the head of the Yonkers municipal housing authority or his designee, a representative of the United States Department of Justice, a representative of the NAACP, the fifth member to be the executive director of the office of Fair Housing Implementation who shall serve as chairman of the commission and who shall have a vote only in the event of a deadlock among the other members of the commission, that is, will have only a tie breaking vote.

In the event that any commission action shall be predicated on the casting by the executive director of a tie breaking vote, any member of the commission may appeal the matter to the court for its determination.

Any vacancies in the membership of the commission shall promptly be filled by the nominating party, if such vacancy shall exist for more than 20 days, by the court.

Any and all funds necessary for the operation of the commission shall be provided by the City of Yonkers from its general treasury.

All of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan shall

vest in the Yonkers Affordable Housing Commission including, but not limited to, adoption of zoning variances, density bonuses and any other actions necessary or appropriate to facilitate construction of said housing.

In a manner consistent with said remedy orders to the maximum extent possible deference shall be given to the existing enactments of the city council and such views as it may from time to time see fit to communicate to the Yonkers Affordable Housing Commission but such enactments or expressions of views shall not be binding on the commission.

The city council may at any time petition the court to rescind this order vesting authority in the Yonkers Affordable Housing Commission and to abolish that commission upon a showing of the city council's willingness and ability to function in a good faith, responsible fashion in implementation of the housing remedy orders of this court.

Were such an order promulgated there would also be adopted the affordable housing ordinance of the City of Yonkers generally along the lines of the draft submitted by the Abeles firm which draft tracks the long-term plan except that where reference is made to action by the City of Yonkers or any of its agencies, such as the Yonkers Planning Commission, there would be substituted the Yonkers Affordable Housing Commission.

Subject to such modification of dates as may be appropriate, the other provisions in the proposed order of the Department of Justice and the NAACP with respect to appointment of a director of the office of implementation, dissemination of information and so on would also be adopted.

If there are any questions, I will attempt to answer them. If the parties are prepared to comment on the court's suggestion now, I would hear them. If they wish to adjourn until tomorrow to give the matter further thought or consultation, I would entertain that as well.

Does anybody have any questions or wish to make any comment?

MR. SUSSMAN: Your Honor, I know some of the clients are here, Mr. Wallace, the head of the NAACP. Is it possible to have a ten minute adjournment?

THE COURT: Yes. I should also note the presence of the corporation counsel, the mayor and the city manager and, yes, and it need not be ten minutes. Why don't you simply advise me when it is that you wish to reassemble.

(Recess)

(In open court)

THE COURT: Well, someone. (Pause) It is a rare moment. Mr. Sculnick.

MR. SCULNICK: Obviously, I am anxious to hear the views of the other parties as well, but quite simply the city would like to bring it back to the council to give it some consideration. Your Honor has obviously given it a great deal of thought and it deserves commensurate thought by the city council.

It does come as something of a surprise because I think it goes a bit further than the point we were trying to make in our memorandum, but I understand your position. The MHA is unsure of its role. Its role has traditionally been related to public housing and this puts it into the long-term plan. These are issues we would like to give some consideration to.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Your Honor, I have not been able to reach the ultimate departmental official that would have to make a final decision but I do have a few comments.

Your Honor, our reaction would be negative to the proposal of the court. Our reason for submitting a proposed order as we did was very simple.

One of the things that we all learn as we grow up, your Honor, is from a very early age there has to be respect for the law and in this case quite plain and simply the City of Yonkers has shown a total disrespect for the law.

While this court was affirmed by the Second Circuit in a law [sic] on June 13 the Supreme Court decided not to disturb: When two years passed, the housing remedy order; where six months passed, the consent decree. Nothing has been done in this case and past the submission of the city, the brief you were handed this

morning clearly indicates the city council of Yonkers simply does not want to take any responsibility for carrying out the law.

They want to flout the court's orders. They want to make all kinds of statements in the press and everywhere else about your Honor, about the orders, about what they are not going to do and they want once again to be let out from under having to do anything so they don't have to explain to their citizens why they are doing something or not doing something.

I would read, your Honor, from a New York Times article that I just was handed this morning from Sunday, July 10, and in talking about the proposed order of the United States and the hearing today, the article reads as follows:

Councilman Nicholas V. Longo, the Republican minority leader and one of those who voted for condemnation of the church property, said: I don't think the votes are there for the council to reverse itself. He anticipated a contempt hearing before the judge.

Asked if he was prepared for that and the possible consequences, Mr. Longo said that "At that point we'll be able to assess the wisdom and veracity of Mr. Spallone who says the judge will never do anything."

Your Honor, we believe the court has to do something here. We believe the court has to send a message to the city that it cannot continue to flout the court's orders and then have the court let it off the hook by doing something else.

We think and the reason we proposed the order as we did, your Honor, is we believe the city must take responsibility for its actions. It has to implement the long-term plan. It has to appoint a housing director. It has to do it within the timetable that we set forth and, if it doesn't, the United States is fully prepared to move forward with contempt.

Thank you.

THE COURT: Mr. Sussman.

MR. SUSSMAN: I can't speak except if I am standing at a podium, so I am moving over here.

I disagree strongly with the comments of the United States, Judge, and I also don't think that this matter should be remanded to the city council of the City of Yonkers for any decision on its part.

I don't think this is a matter that should be determined by consent of the city council. I think they long since altered that. The court should enter the order provided by the court on its own motion and in light of comments by all parties should enter this order.

I don't see the City of Yonkers coming back to the court as it has done so many times before with some alternative or some other impact. I think we are beyond that.

Let me make a few comments directly on what the United States has said and some of the specifics your Honor laid out. The fact of the matter is that the order which was prepared jointly by the United States and NAACP has essentially a sequence of events in it as I am sure the court is aware.

The sequence of events are, first, fines, then potential jail time, then and upon a finding of contempt with reference to failure to abide by orders after those two fairly strong measures, then we would according to the sequence of that order go forward with the creation of a new entity which would be funded by the City of Yonkers to carry out tasks that Yonkers still had not carried out. That is the sequence.

Frankly, that sequencing in my opinion is unnecessary. I think what the court has suggested this morning speaks to the non necessity of the sequencing. It seems to me it is clear that the only issue now before the court really, as you put it yourself, is whether there should be fines and contempt because the City of Yonkers through its counsel has refused the act and thumbed their nose at the court through the public statements, resolutions and non-compliance or whether that step essentially should be itself circumvented or ignored.

In other words, no fines, no jail and simply the most drastic action taken, which would be the stripping of the City of Yonkers' governmental officials directly of their responsibilities. That is the third event in the order. It would be the first event in the court's directive.

In my opinion is a fully justified event. I don't think we have to go through and to my mind there is really the charade of the city council not taking actions they have been ordered to take as they already said they would not take and then being fined which, as everyone knows, would redound substantially to the detriment of the minority community in Yonkers. There is no doubt about that.

There is really nothing that the court has indicated it would do about that. The court has always taken the position that the internal budgetary affairs of Yonkers are apart from this case. The court has been consistent with it and, therefore, what we are left with is Yonkers perhaps paying millions of dollars in fines, budget cuts that affect deleteriously our side of the community much more without any real recourse.

Then we get jails and the jailing of people which certainly can be justified, as would the fines be, I am not saying they wouldn't be justified. The question is to what effect.

I said a year or two ago about the subject, and I really believe the same is still true, that what we have is the creation of martyrdom. We assure their political success so they would succeed themselves and I don't really see a great purpose to be served by that.

I think the message that has to be sent and I think it is consonant with what the government has said, Mr. Heffernan, that you have not obeyed the law. You told us you are not going to obey the law. Your chance is up. Goodbye.

Now, I think the problem with the court's proposal is in a way it is not strong enough on that point. Let me make a few comments about that. I don't think any order now should say that this five member body should pay deference to existing enactments of the city council and then have language that such enactments would not be binding. I don't think there is any place for that. We know what those are.

THE COURT: That was a reference to existing zoning, existing—

Obviously, when you consider any housing or any development, you look at what is in place. I certainly did not mean to

include the last two resolutions of the city council with respect to the court's view as to whether they are null and void, I thought I had already made clear that I not only regard them as being null and void but the very adoption of them being contempt of court.

MR. SUSSMAN: I guess the point is that perhaps we should have a more specific order which directs this group to the existing and as changed zoning ordinance of the City of Yonkers, building codes, whatever else needs to be referred to, but it should be made clear in this order, I think language should be included, that if the city council of Yonkers is specifically on notice that should it take actions and pass resolutions intended to impede the work of this commission, the court would view that as contemptious. I think that needs to be here.

Sure, their input on matters of substance where those inputs are made in good faith, fine. I don't have a problem with inviting that. I do have a problem with the suggestion that other than long-standing zoning ordinances, as they are amended by the long-term order legislation, that other than that, any deference should be paid whatsoever. I think the contrary and we also have conferred with Mr. Wallace.

We also have a few other concerns I would like to put before the court. First of all, the NAACP would like to be represented on the group and I believe that at present the NAACP would be a proper and appropriate designee rather than "counsel", meaning myself.

At the same time we would like for any order to permit at meetings counsel to be present for the reason that given the long-standing involvement I have had in this case and the nature of the organization, obviously changing presidencies and different technical issues which any president may learn about but in the transitional period, we would like that to be explicit so there would be no dispute.

I understand we would have one vote cast by the president, but we would like to have counsel's presence permitted at the meetings.

We also feel that the city should be on clear notice that if it has two designees out of five, which is what effectively is being

done, excluding the executive director of the Fair Housing Office, that those designees are to act here in furtherance of the orders.

I don't want to create a situation quite honestly where everybody is two-two and we go to the executive director and we are appealing everything to the court. It would extend the stalemate and would only lead to tremendous delays.

If the city is going to be able to participate with two votes essentially, and I respect the independence of the MHA and the possibility of political leverage, we can't have people there doing the bidding of the city council which led to this in the beginning. It is institutionalizing the deadline and that leads to the court having to play a greater role rather than a lesser role.

We will be here having a review on every vote. I think we have to set this up with the cognizance that if there is to going to be representation of the city, those representatives have to act in furtherance and be able to defend what they do, as we do, in furtherance of the objectives.

Now, let me just make a couple of other comments and I don't know if we will discuss this in any further detail. I am not satisfied with the legislation prepared but it does, as your Honor says, track rather respectfully the decree. It seems to omit things that such legislation should really deal with or purport to deal with. Let me just mention a few of those things and make a proposal which I have discussed with other counsel on this.

Just let me mention three problems that we see or I see at least in the legislation. First of all, the legislation provides that the planning board, your Honor has now said your order is going to be signed, the proposed order would make this new group, the Affordable Housing Commission, that group would have decisional responsibilities.

Clearly under state law there would be appeals both by property owners who don't like what is being dispensed to them and by potentially neighborhood groups or neighboring property owners who believe that whatever is being done trespasses some right of theirs. I think the legislation is going to have to deal with that question.

I don't think it can be silent on that or we will have a repeat of what we have had with the seminary and the racetrack. I think we

either have a process that is called for in the legislation by which anyone who has such complaints have to provide written notice and there is an appeal process administratively and recourse to the courts.

I believe the recourse should be to this court because I believe if we don't do that we have the prospect of substantial delay, nonimplementation, et cetera. I respectfully argue that this court might want to appoint a magistrate to handle many of those details because this judge I know has 400 odd cases and every appeal can't really be handled here.

THE COURT: The reason behind having the chairman exercise only the tie breaking vote but to vote before the matter came to the court was a hope that that would minimize the occasions on which there would be recourse to the court and that any matter that did come to the court would come to the court to review a determination that had already been made.

Obviously, when you create any body, its effectiveness is largely a function of the caliber and integrity of the persons who occupy that body. The thinking was to have—with respect to the two representatives of the city—to have persons who were in fact representative of the city but who did not hold elective office.

I am aware of the fact that individuals may change and one cannot assume the continuity of the present encumbents, but I don't know of any language that can be put into a decree which is anything other than precatory which says that persons are to act responsibly—

MR. SUSSMAN: I agree.

THE COURT: —and in good faith.

MR. SUSSMAN: It might be described as precatory, but I do think that the notion is that this body is being created to carry out orders rather than carry on debates has as to whether orders ought to be carried out is an important conception.

With respect to the means, there may be disputes in given cases but that presupposes a general agreement as to objectives

which the members of the group in my judgment have to share. I think the order has to be premised on the fact that we share them. Not we are just adjourning all our disputes about whether anything is going to be done at this meeting.

Frankly, we will just really be wasting our time and effort and motion. It will have a polarizing rather than a curative effect. I think that is really a difficult decision the court has to make.

For the NAACP, we are prepared to sit in a room with the government, with the executive director and with the city manager, with Mr. Smith and deliberate on a case by case basis which is, of course, the nature of the deliberations this body would engage in with the understanding that those in the room are implementing an order and not that we are debating whether the order should have been entered.

THE COURT: Let me also—just sharing thoughts with you. Ideally the chairman would be the key figure here and the body would be—once the chairman had earned the respect of the commission, would function in the nature of—the relationship would be analogous to a chief executive officer and a board of directors. That would be the ideal.

MR. SUSSMAN: You are referencing the sense of deference which is accorded generally to the operating procedures that are undertaken by that chief executive with review in policy matters by the board.

THE COURT: Yes.

MR. SUSSMAN: Let me make a couple of other comments. While I agree entirely that the planning board, and I believe it is the planning board, should not have the functions at this point in time, rather they should be superseded by this body in terms of decisional functions.

It is also true there has to be a provision allowing the executive director to make use of the staff to the extent necessary in effecting the analyses that must predicate his recommendations. Again I don't think that should just left be up to—that is an expectation—I think that should be in any order that the city is directed

to provide that support staff as needed to do the analyses and again I think what we are really doing here is bifurcating between the political wing of the city and the administrative wing. I think that is really what is being attempted.

THE COURT: You see, as so often happens in our society, the problems end up on the desk of a federal judge. There are other approaches that the city council might have taken to deal with the problems it confronts, but it has not done so. It has come forward with no affirmative suggestion other than that the court do it.

I don't want to get into a debate with any individual city councilman, but I do think it's appropriate that I repeat something which I think I have said on more than one occasion in the eight years of this case.

The problem before this court is not whether it has power to effect its remedies. It has vast powers. Bankrupting Yonkers is simply one of them.

I have from time to time as a mental exercise drawn up a list of the possible sanctions that could be invoked. Incarcerating representatives of Yonkers is simply one of them.

One could draw up a list of all the discretionary benefits which the City of Yonkers receives and go down them item by item and raise the question whether it is appropriate that a community which has chosen to be the national symbol of defiance to federal civil rights orders is an appropriate community to be the recipient of such discretionary funds. I could go on and on.

The suggestion of the commission, and it is only a suggestion, is not viewed by this court as a retreat from the exercise of power. It is simply an alternative means of accomplishing what is the prime objective. The prime objective is not a civics lecture. I have given too many of those. The objective is to get some housing built.

MR. SUSSMAN: Just two other points. I frankly think that is a principal issue and it may in fact, judging from the govern-

ment's remarks, be a slight difference in emphasis between the NAACP, for instance, and the government.

I think as well that overwhelmingly the critical need is implementation. The City of Yonkers actions to me are relevant mostly because they have impeded implementation.

THE COURT: They have abdicated, but the recognition is that they have abdicated, whether from choice, voluntarily or by virtue of circumstances, there is an abdication of that role and there is a vacuum and we have to deal with that.

MR. SUSSMAN: If you perceive the vacuum needed to be filled as the priority as I do and perhaps as the court does or whether you see the key issue as has been very well stated as a community's refusal to follow federal court orders and the issue being compelling them to follow court orders, I think that is a very critical question, but given the amount of time that we have spent, to spend more time in a sense playing out whether we can force them to comply and at what cost, that is, fines, jail, the like, in a sense as opposed to getting the structure in place or playing that out before we get a structure in place doesn't seem to me at this point justified. I think that is an issue.

THE COURT: The other way in which the matter may be dealt and there are some decisions I think that can be made fairly promptly and some may require some further thinking is to treat the matter generally as it is treated in the proposed order. That is, the creation of the entity being one of several steps that are to be taken.

What I think might be the most appropriate way to leave things is to set a schedule for various things that are to happen and for the filing of further comments.

Let me also raise in connection with the commission concept a problem which I perceive but frankly do not know the definitive answer to and that is the relationship between the commission, the finances of Yonkers and the Emergency Financial Control Board.

For example, one of the functions of the commission would be to deal with applications for tax abatement. How that gets structured in in terms of the overall financing of Yonkers and its obligations vis-a-vis the Emergency Financial Control Board, if it has any, which relate to finances are matters which I think should be thought of by the parties.

It seems to me the first and immediate matter to be dealt with is the appointment of the director of a Fair Housing Office. There would be such a person, whether he will occupy the role limited to that envisioned in the long-term plan or the greater role envisioned in the court's suggested commission probably does not significantly alter the background qualifications one should be looking for for a person to occupy that role.

Now, I have received a list of candidates.

I am talking about the Office of Implementation and not the Fair Housing Office. I get bogged down in the titles.

Has everybody been furnished a copy of the resumes?

MR. HEFFERNAN: Are you talking about Oscar Newman—

THE COURT: I have a letter from Oscar Newman dated June 30 with the resume of a few candidates which says "it is the intent of the city manager and myself to interview shortly after I return from vacation." I think he is back today.

MR. HEFFERNAN: Your Honor, if I may ask a question. In the city's brief we got this morning it said the city received 28 resumes and the city manager has forwarded the top six candidates for review.

If I could ask Michael Sculnick whether those are the same people as the judge is talking about or whether we are talking about different people?

MR. SCULNICK: I think those are additional people.

MR. HEFFERNAN: That will be 11 or 12 now?

MR. SCULNICK: 12.

THE COURT: I would like to set the earliest possible date for the court to interview the leading candidates. Could that possibly be this week? Could we do that Thursday?

MR. SUSSMAN: Sure.

THE COURT: Thursday morning—

MR. HEFFERMAN: Your Honor, again, there is a meeting scheduled, which has some importantance, on Thursday morning at 10:30.

THE COURT: All right.

MR. SCULNICK: Your Honor, I think it would be impractical for the court to be interviewing them by Thursday because neither the city manager or the outside housing authority has interviewed anybody. I think there should be that screening process and perhaps by early or middle of the next week, but I don't think anybody could come forward to the court this week.

THE COURT: Let me have, then, by Tuesday of next week the resumes of the leading candidates and, if possible, if there is a consensus candidate, that would be very nice. If not, then I will interview the two or three leading candidates. I will set the date for that interview after I have received the recommendations next Tuesday.

With respect to the proposed ordinance, whether it is adopted by the city council as directed by the court, adopted by the court or adopted as the first act of the Yonkers Affordable Housing Commission, really affects some of the provisions but does not affect many others.

MR. SUSSMAN: On that matter we had ourselves—since we just got this—I think counsel have agreed that next Monday we are going to meet with Abeles and Schwartz and try to get together some additions.

THE COURT: Fine. Then you are going to meet on Monday.

MR. SUSSMAN: I think by the end of that week we were proposing to have it finished and have it in final form essentially, which would be the 22nd.

THE COURT: All right. Then with respect to the concept of a commission—first of all, let me say that some of the points that you have made as to the language of the commission and so on I think are, Mr. Sussman, well taken and I certainly have not purported to do anything but broadly outline how such a commission should be constituted.

With respect to the matter raised with respect to whether Mr. Smith as the head of the MHA should be a member of that commission or someone else, I was really, apart from my personal admiration of Mr. Smith, I was looking for somebody knowledgeable in housing in the City of Yonkers and not an elected officer.

MR. SUSSMAN: Can we have ten days to make comments on that, perhaps?

THE COURT: Yes. Understand I am not wedded to it. I think that it might be useful here. It might be useful in alleviating this repeated crisis and confrontation in Yonkers which certainly must be harmful to a community which is seeking to attract industry and achieve other improvements in its circumstances.

You asked for ten days for comments. What I have been trying to do is not to hold everything in abeyance. You had suggested for example, in the order that by July 26 there be a dissemination of matters. Obviously that timetable will have to be altered.

Ten days will take us to the 23rd of August. I am wondering whether we should schedule another meeting now—

MR. SUSSMAN: The 22nd of July. You said August.

THE COURT: The 22nd of July. Should we schedule another session on July 26? That is a Tuesday. July 26 at 10 a.m.

Is there anything other than the matters we have specifically indicated that should be going forward between now and then?

MR. SUSSMAN: Judge, there is one other matter that is of concern. I don't know if there is any record of it yet. I believe this court provided direction regarding the seminary site and the raceway site and I think that we need to know what is happening with those sites at this time.

THE COURT: What is happening physically, legally?

MR. SUSSMAN: Legally. The matter was remanded.

THE COURT: Mr. Sculnick, can you enlighten us as to what the status is in the state court?

MR. SCULNICK: It is my understanding that the proposed orders and briefs are fully submitted and the state court has not sought any further argument or input from any party so it is submitted to the state court judge.

THE COURT: Oral argument is scheduled for next week in the appeal from my orders?

MR. SCULNICK: Yes.

THE COURT: And there is one other matter pending on appeal with respect to the schools?

MR. SCULNICK: That is a pending decision, yes.

THE COURT: All right, then. Let's review it.

By Tuesday of next week—

Mr. LaRIZZA: Could I ask a question before you do? Would the Affordable Housing Commission have any responsibility at all with respect to the 200 public housing units or is it limited—would its responsibilities be limited only to the affordable housing, trust funds housing?

I ask the question, your Honor, because I believe when you described the basis for the commission you mentioned that it was to implement housing and my recollection is that the remedy order includes the 200 units.

THE COURT: If all of the orders of this court now in effect were to go forward, it would seem to me that this commission

would have little or no operative responsibilities with respect to the 200 units except, of course, as the long-term plan itself indicates one of the considerations in terms of sites for affordable housing and so on would be the sites for the 200 units.

If for any reason there should be a need to revise any of the existing orders, then one might then revisit that question. I think that is a specific as I can be.

MR. LaRIZZA: Thank you, your Honor.

THE COURT: Let's review again what is to occur.

By Tuesday of next week I am to be furnished with the resumes of the leading candidates for the director of the Office of Fair Housing Implementation, executive director.

I understand that the parties are meeting next Monday with Abeles and Schwartz to consider the proposed affordable housing ordinance.

That by July 22 I am to have received comments from all of the parties with respect to the ordinance and with respect to the proposed commission. With respect to the commission proposal, I would like to see a draft of an order appointing such a commission dealing with some of the issues which have been raised. I would ask that such an order be prepared even if there is no strong sentiment in favor of such a commission.

MR. DUDLEY: Your Honor, which date are the comments due by?

THE COURT: The 22nd.

We will meet again on July 26 at 10 a.m. If any emergency matter or other circumstance arises so that it would be appropriate for us to meet at an earlier date, we can arrange to do that. This is a matter of utmost urgency and the court will make itself available.

Is there anything else?

All right. Then, we are adjourned until July 26 at 10 a.m.

(Adjourned to July 26, 1988 at 10 o'clock a.m.)

EXHIBIT W

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

- against -

80 CIV. 6761 (LBS)

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

CITY OF YONKERS COMMENTS WITH REGARD TO THE PROPOSED YONKERS AFFORDABLE COMMISSION

At a July 12, 1988 hearing, the Court invited the comments of all parties to a suggestion made by the Court that there be created an entity entitled The Yonkers Affordable Housing Commission ("Commission"). The Commission, which would have four voting members (comprised equally of Plaintiff and Defendant representatives) and a tie-breaking chairman (the Executive Director of the Office of Implementation), would be vested with all governmental functions currently held by the City Council as they relate to the housing envisioned by the Housing Remedy Order, Consent Decree and Long Term Plan, including but not limited to, granting tax abatements, adopting zoning variances and density bonuses, and taking other actions necessary or appropriate to facilitate construction of housing under those decrees. (Tr. of hearing July 12, 1988, at p. 7).

After giving the Court's suggestion due consideration, the City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. Specifically, the City Council now has powers under state law to grant tax abatements, in accordance with

statutory requirements, and also has authority under state law to adopt zoning ordinances, grant zone changes, and review requests for variances and special exception uses under explicit statutory criteria. The loss of those specifically granted powers must be viewed with great caution and concern from the perspective of a City Council which is popularly elected. As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

Our review of the caselaw indicates that whereas there is precedent for assuming certain administrative functions in prison or school board cases*, we know of no case in which, as a remedy for findings of violations of the Fourteenth Amendment, a federal court has actually supplanted the legislative functions of a local municipality. In those cases where the Court has appointed a monitor or committee to oversee the administration of a school district undergoing desegregation, *see e.g., Reed* vs. *Rhodes, supra,* no legislative powers were superceded. While it may be accepted jurisprudence that a federal court has the power to override, in a specific instance, actions of a local legislature which are in violation of the Fourteenth Amendment, *Hunter* v. *Erickson,* 393 U.S. 385 (1969), we know of no judicial authority which would permit, in the first instance, the creation of a non-representative body which functions, in part, as a legislature.

---

* *See Powell* v. *Ward,* 643 F.2d 924 (2d. Cir. 1981) (affirming appointment of special master to oversee future compliance with orders in prison case); *Morgan* v. *Kerrigan,* 530 F.2d 401, 427-29 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976) (affirming appointment of Citywide Coordinating Council, which had *no* power to "co-manage or make policy for the Boston Schools"); *Reed* v. *Rhodes,* 635 F.2d 556 (6th Cir. 1980), *as modified by* 642 F.2d 186 (6th Cir. 1981) (affirming appointment of Administrator of Desegregation to implement remedial orders.)

On balance, therefore, the City cannot support the creation of a Commission as proposed by the Court.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By: s/ Michael W. Sculnick

MICHAEL W. SCULNICK
Attorneys for Defendant
City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1891

Dated: New York, New York
July 25, 1988

QUESTION PRESENTED

The City of Yonkers, a nominal respondent in this action, will address the following question:

Whether a federal court may impose contempt sanctions when equally effective, alternative remedies are available to implement a remedial decree?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. Contempt Sanctions Should Be Used Only When No Less Intrusive Remedial Power Is Available	11
II. The District Court Erred By Using Its Contempt Power Rather Than Exercising Its Power Under Fed. R. Civ. P. 70 Or Creating A Housing Commission	12
III. The District Court's Premature Use Of Its Contempt Power Was Not Justified Simply Because It Purported To Enforce A Consent Decree	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Anderson v. *Dunn*, 19 U.S. 93 (6 Wheat.) (1821)	9, 12
In re Michael, 326 U.S. 224 (1945)	12
Milliken v. *Bradley*, 418 U.S. 717 (1974)	11
Rizzo v. *Goode*, 423 U.S. 362 (1976)	14
Sheet Metal Workers v. *EEOC*, 478 U.S. 421 (1986)	12, 17
Shillitani v. *United States*, 384 U.S. 364 (1966)	9, 12
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)	11, 13
United States v. *Paradise*, 480 U.S. 149 (1987)	12, 17
United States v. *United Mine Workers*, 330 U.S. 258 (1947)	12, 16-17
Constitutional Provisions and Statutes	
U.S. Const. amend. V	6
U.S. Const. amend. VIII	6
U.S. Const. amend XIV	2
Civil Rights Act of 1964, Title IV, 42 U.S.C. § 2000c-6	2
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d	2
Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3604(a)	2
Other Authorities	
Fed. R. Civ. P. 70	10, 11, 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-854, 88-856 and 88-870

HENRY G. SPALLONE,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

PETER CHEMA,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents,

NICHOLAS LONGO AND EDWARD FAGAN,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT CITY OF YONKERS IN SUPPORT OF PETITIONERS

STATEMENT OF THE CASE

1. This action was instituted by the United States against the City of Yonkers (the "City"), the Yonkers Community Development Agency and the Yonkers Board

of Education (the "Board") in the United States District Court for the Southern District of New York on December 1, 1980. The complaint, which alleged violations of the Fourteenth Amendment to the United States Constitution, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6, sought injunctions requiring the Board to implement a system-wide plan of desegregation and required the City and the Community Development Agency to adopt a housing remedy plan locating public and subsidized housing throughout the City of Yonkers. The Yonkers Branch—National Association for the Advancement of Colored People, *et al.*, was permitted to intervene as a party plaintiff. See *City of Yonkers* v. *United States*, Petition for Certiorari, No. 87-1686 at 2.[1]

On November 20, 1985, the district court issued a liability opinion, *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), finding, *inter alia*, that the City had violated the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act in its selection of sites for public and subsidized housing.[2] Following its finding of liability, the court issued a series of remedial orders, including a requirement that 200 units of public housing be built on the east side of Yonkers. See *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986). On December 28, 1987, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the district court

---

[1] The petition for a writ of certiorari in No. 87-1686, raising, *inter alia*, the issue of the City's liability for intentional discrimination based on its placement of public housing, was denied by this Court. 108 S.Ct. 2821 (1988).

[2] The district court also found that the City and the Board had violated Title IV of the Civil Rights Act and the Equal Protection Clause by maintaining and operating a segregated school district.

"in all respects." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1239 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988). This Court denied the City's petition for a writ of certiorari on June 13, 1988. 108 S.Ct. 2821 (1988).

2. On January 28, 1988, the Yonkers City Council approved a remedial consent decree (the "First Remedial Consent Decree") setting forth the actions that the City would take "in connection with [the] consensual implementation" of the district court's Housing Remedy Order. See *Spallone* v. *United States*, No. 88-854, Pet. App. A1791 ("Spallone Pet. App."). With respect to the City's obligation to build 200 units of public housing in eastern Yonkers (the "short-term plan"), the consent decree acknowledged the City's commitment to build the units, identified seven sites for construction and set a timetable for specific steps to be taken toward construction. *Id.*

In addition, the consent decree acknowledged that a "long-term plan" which provided for private development of 800 units of assisted housing was "an appropriate target." Spallone Pet. App. A1821. In furtherance of this goal, the City agreed to adopt legislation that would require 20 percent of all new multi-family housing to be set aside for low- and middle-income families. The City also agreed to provide for certain incentives, such as zoning changes, variances, special exemptions and tax abatements, necessary to attract private investment in developing the assisted housing. *Id.* at A1841.

On June 13, 1988, after the parties had failed to reach agreement on the specific components of a long-term plan, the Court entered an order, which set forth detailed provisions for the development of an assisted long-term housing plan. See Spallone Pet. App. A164k ("Long Term Plan Order"). One week later, the district court asked the City Council to pass a resolution expressing its willingness to adopt the zoning ordinance once it had been drafted by the City's experts.

When the City Council failed to pass such a resolution, the district court, on June 29, 1988, directed plaintiffs to submit a draft order that would require the City to take "specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines." *City of Yonkers* v. *United States*, No. 88-855, Pet. App. 59 ("Yonkers Pet. App."). At the July 12 hearing on the proposed order drafted by the NAACP and the United States, the City urged the court not to force a confrontation with the Council but instead simply to enter an order deeming the necessary legislation to have been adopted by the Council on behalf of the City. The district court, however, declined to do this. Instead, the court proposed the creation of an independent "Yonkers Affordable Housing Commission" to exercise all of the City's authority with respect to implementation of the housing remedy order. The City, at that point, opposed the creation of such a Commission because the narrow legislative action necessary to initiate implementation of a long-term plan could have been deemed enacted by the district court without divesting the City of all authority over housing issues.

At the district court hearing on the proposal to create the Affordable Housing Commission, the NAACP supported the proposal, but the United States objected, arguing that the City should be directed to adopt implementing legislation immediately or to show cause why it should not be held in contempt. The City again urged the district court not to punish the City but to move forward in the most efficient manner by simply utilizing its own remedial authority to implement the Long Term Plan Order directly.

The district court, however, made no finding concerning the efficacy of any alternative to contempt sanctions. Instead, it adopted the recommendation of the United States and immediately incorporated it into an order. The order directed the City to "enact, on or before August

1, 1988, the legislative package relating to the long-term plan as described in" the consent decree and Long Term Plan Order. Spallone Pet. App. A161j. Failure to do so would require the City and the individual members of the City Council to appear the next day (August 2) and show cause why they should not be held in contempt of court.

The City Council is the City of Yonkers' sole governing authority. The Council consists of seven members, six of whom are elected to represent specific districts and the mayor, who is elected on an at-large basis. The chief executive official, the City Manager, serves at the pleasure of the Council. Spallone Pet. App. A30a. Other administrative and executive officials of the City serve at the pleasure of the City Manager or in accordance with state civil service requirements.

On August 1, 1988, the City Council by a 4-3 vote defeated the resolution of intent that would have set in motion the process of adopting, under New York law, the zoning legislation necessary to implement the court's Long Term Plan Order. The next day the City and the four members of the City Council who voted against the resolution were adjudicated in civil contempt by the district court.[3]

As outlined in its July 26, 1988 order, the court imposed on the City a fine of $100 per day, which would be doubled each day until the City complied with the court's order to enact legislation. Under the terms of that order, the City would be subject to cumulative fines that reached $10,000 by day 7, $1,000,000 by day 14, $200 million by day 21 and $26 billion by day 28. Pursuant to this schedule, the City's annual budget would have been ex-

---

[3] One council member, Spallone, who had voted against the resolution was not represented by counsel at the August 2 hearing. He was allowed a continuance to obtain counsel and was adjudged in contempt on August 4, 1988, and fined retroactively to August 2.

ceeded by day 22. The court also imposed a fine of $500 per day against each member of the City Council who had voted against the resolution and ordered each council member who did not vote in favor of the legislation within 10 days to be jailed.

3. On August 9, 1988, the United States Court of Appeals for the Second Circuit granted a stay of the sanctions against the City and individual council members, pending expedited appeal of the contempt sanctions. On August 26, 1988, the court of appeals affirmed the district court's order with respect to the individual council members and affirmed, with one modification, the order with respect to the City. The court first held that the district court did not abuse its discretion in proceeding with contempt sanctions, rather than using its authority either to adopt the necessary ordinances or to establish the Affordable Housing Commission. Spallone Pet. App. A24a. The Second Circuit also held that the district court did not err or abuse its discretion in choosing to impose a contempt sanction against the City as well as the City Council. The court stated that "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." *Id.* at A30a. Thus, "the City, along with the defiant council members, may be subject to civil contempt sanctions." *Id.*

Finally, the court of appeals also rejected the City's contention that the amount of the fines imposed was excessive and a violation of the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. However, the court of appeals concluded that, "[a]t some point . . ., the doubling [of the fine on a daily basis] reaches unreasonable proportions." Spallone Pet. App. A34a. The court thus found that "the doubling exceeds the bounds of the District Court's discretion when the level of each day's fine exceeds $1 million." *Id.* Accordingly, the court modified the district court's order so that "the fine shall be $1 million per day

on day 15 and $1 million per day for every subsequent day of noncompliance." *Id.*

On September 1, 1988, this Court granted applications of the four individual council members for a stay of the contempt citations against them individually pending timely filing and disposition of a petition for a writ of certiorari. 57 U.S.L.W. 3183. Accordingly, the stay removed the threat of imminent imprisonment of the four individual council members and also ended the imposition of daily fines against them. The application of the City for a similar stay was denied, 57 U.S.L.W. 3183, and the City continued to pay fines until a majority of the members of the Council was willing to vote to bring the City into compliance with the district court's order.

That vote occurred eight days later. On September 9, two of the council members changed their votes against the resolution, allowing the Council, by a 5 to 2 margin, to purge the City of contempt by adopting the requisite resolution. At that time, the City had paid approximately $800,000.00 to the United States in contempt citations and was on the verge of discontinuing, or cutting back, vital City services. In fact, City officials were contemplating filing under Chapter 9 of the Bankruptcy Code.[4]

The individual council members, who had been and continued to be represented separately from the City, filed petitions for writs of certiorari raising, *inter alia*, the issues of whether the district court erred in using its contempt power when less drastic means were available and whether, in any event, the district court had violated their right to legislative immunity or their right to free

---

[4] The original August 2 order adjudicating the City in contempt provides that any resumption of contumacious conduct will result in renewed fines "at the level at which the fines had previously ceased" —$1 million per day. Yonkers Pet. App. 67. On September 14, the district court reiterated that any subsequent refusal of the Council to comply with *any* of its orders would result in the resumption of contempt fines against the City at this $1 million per day level.

speech. On March 6, 1989, this Court granted petitioners' separate petitions and consolidated the cases for argument and disposition. Also on March 6, 1989, this Court denied the City's petition for a writ of certiorari. Accordingly, the City remains in this case as a nominal respondent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ordinarily, the City of Yonkers and its City Council members collectively speak with one voice and pursue identical interests, but they always remain separate legal entities. The fact that the City is represented separately from the Council members in this proceeding is revealing; it reflects the conflict of interests implicated by the entry of contempt by the district court against both the City and the individual Council members.

Because of this Court's treatment of the City's petition for a writ of certiorari, the City is placed in an awkward position in these consolidated proceedings. It has lost hundreds of thousands of dollars because of the conduct of certain individual Council members, which it was essentially helpless to prevent or to stop. At any point in time, the City could again be exposed to bankrupting fines as the district court and the Council members spar over the meaning and import of the consent decree. Indeed, if this Court holds that the members are individually immune from contempt, then the City's position as a pawn in the dispute between the Council and the district court becomes even more precarious.

On the other hand, it is now clear that, as a matter of law, the City must bear the responsibility for the official acts of the Council members. That is the unmistakable import of the Second Circuit's decision and the denial by this Court of the City's separate petition, even during the pendency of the individual Council members' cases before the Court. In this regard the City is not unmindful that disaster for the City as a corporate entity ultimately was avoided because the prospect of savage cuts

in municipal services and bankruptcy were sufficiently unpalatable politically that two Council members switched their votes and brought the City into compliance with the district court's order. At the same time, however, two Council members were content, under the protection of a stay, and therefore personal immunity, to continue to disobey the district court.

Accordingly, the City in a very real sense has a Sword of Damocles over its head. The possibility of disputes in the future between the City Council and the district court is a very real one. As long as the district court is willing, at the insistence of the United States, to enter orders aimed more at forcing personal compliance with the court's authority than at remedying the constitutional violations the court has found, then confrontation will continue to be the standard mode of operation. And the City will face the prospect that, because of personal, political and institutional concerns, the Council members will act to place the City in contempt.

This problem has a solution and it is one that is wholly consistent with the law of contempt. If the district court employed contempt as a last resort, and only after all other remedial measures had failed to achieve desegregation, then the City would be spared. Not only does such an approach minimize the risk that the fourth largest city in the State of New York will be placed in financial chaos in the future if the Council members and the court find themselves at odds, but it also conforms to the clear equitable limitations upon the proper exercise of the contempt power, which this Court already has announced.

It is well-established that a court should not impose contempt sanctions unless they are "[t]he least possible power adequate to the end proposed." *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson* v. *Dunn*, 19 U.S. 93 (6 Wheat.), 105 (1821)). In this case, at least two less destructive, equally effective remedial alternatives to the use of contempt sanctions were avail-

able to the district court: (a) the district court could have exercised its power under Fed. R. Civ. P. 70 to deem enacted the legislation it sought to compel the City to enact, or (b) the court could have established a Housing Commission with authority to act in the Council's stead in connection with public housing related matters. There is no finding on the record that either of these alternatives was in any way inadequate or would have been less effective in achieving the goals of the remedial decree. Instead, the district court prematurely resorted to contempt sanctions and thus unnecessarily precipitated a financial crisis for the City and, in the long run, probably delayed significantly the implementation of the short- and long-term remedial plans. The City urges the Court to hold that the district court's failure to employ existing and available alternative remedies before placing the City and Council members in contempt constituted an abuse of discretion.

ARGUMENT

As an initial matter, it is important to reiterate that the City of Yonkers is an entity separate and distinct from the individual City Council members. This distinction has been apparent since the contempt sanctions initially were threatened; since then, the City's interests often have diverged from the interests and agendas of individual Council members. Nevertheless, these differences are not currently at issue before this Court because the Court declined to review the issues raised in the City's petition for a writ of certiorari.

The City's sole remaining interest in this case lies in this Court's determination of when contempt sanctions generally will be appropriate to compel action in furtherance of future orders of the district court. Given the district court's statement on September 14, 1988—that subsequent refusals of the Council to obey *any* of its orders would result in the resumption of contempt fines against the City at the $1 million per day level—the district court

likely will resort to the use of its contempt power, in the future. Moreover, if this Court extends legislative immunity to individual members of the City Council, one disincentive to disobeying an order of the district court will be lifted. From the City's perspective, therefore, it is crucial that the Court hold that the City can be punished with contempt for the immunized acts of Council members *only* if the district court first correctly concludes that no less drastic means exist which are adequate to achieve the court's objectives.[5] In this case, the district court erred by resorting prematurely to the use of its contempt power rather than exercising its authority under Fed. R. Civ. P. 70 or, alternatively, establishing a Housing Commission.

I. Contempt Sanctions Should Be Used Only When No Less Intrusive Remedial Power Is Available.

The propriety of the district court's order directing the City Council to adopt legislation authorizing implementation of the long-term plan's requirements must be assessed against the basic principles of federal court remedial power. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 418 U.S. 717 (1974). Although "the scope of the district court's equitable powers to remedy past wrongs is broad," flexibility rather than rigidity defines the essence of equity jurisdiction and power. *Swann*, 402 U.S. at 15. The most severe of the equity powers, of course, is the imposition of contempt sanctions. Because the procedural protections for civil contempt are limited, it is well-settled that a court in exercising its equitable authority

---

[5] That issue is subsumed within the question presented by the individual Council members concerning the availability of alternative remedies as a limitation on the propriety of the district court's decision to impose contempt sanctions on them. On this issue at least, the City's and Council members' positions are the same. With respect to the other issues raised by the individual Council members, the City takes no position.

must exercise "[t]he least possible power adequate to the end proposed," *Shillitani* v. *United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson* v. *Dunn*, 19 U.S. 93 (6 Wheat.), 105 (1821)). See *In re Michael*, 326 U.S. 224, 227 (1945) (discussing limited procedural protections for civil contempt). Thus, the district court in deciding whether to impose contempt must "consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947).

Under these standards the validity of the July 26 Order cannot be analyzed solely in terms of whether there was contumacious conduct. That much can be conceded. Instead, the validity of the order must be examined by reference to what effective alternatives were available to the district court at the time the court held the City and individual members in contempt, and what less destructive power was available to accomplish its concededly valid goal. See generally *United States* v. *Paradise*, 480 U.S. 149 (1987) (fines do not fulfill Court's responsibility to eliminate effects of past discrimination, nor do they compensate plaintiffs); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 486 (1986) (court should consider the "efficacy of alternative remedies") (Powell, J., concurring in part and concurring in the judgment).

II. The District Court Erred By Using Its Contempt Power Rather Than Exercising Its Power Under Fed. R. Civ. P. 70 Or Creating A Housing Commission.

1. Prior to the entry of the July 26 Order, the City urged the district court to use its equitable authority, embodied in Fed. R. Civ. P. 70, to deem the authorizing legislation adopted as if duly enacted by the City Council. This was not a novel suggestion. In the district court's original Housing Remedy Order of May 28, 1986, the district court gave the City 30 days to select sites

for public housing, failing which certain sites would be "deemed" to have been selected by the City. The district court also has directed the City Council to adopt a Housing Assistance Plan ("HAP"), failing which the district court would adopt on the City's behalf a HAP for submission to the Department of Housing and Urban Development. These aspects of the district court's Housing Remedy Order have been affirmed. *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1237 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2821 (1988). Thus, there was no basis to doubt that the district court could have deemed the resolution enacted and proceeded with implementation of the long-term plan.

The City does not—and could not—dispute that the district court must be able to enforce its lawful orders. Plainly, if municipal "authorities fail in their affirmative obligations . . . judicial authority may be invoked." *Swann*, 402 U.S. at 15. However, in an extraordinary case such as this, the use of contempt power, designed to force individual members of the City Council to vote affirmatively for the adoption of legislation was an abuse of discretion where the court had before it an entirely suitable, indeed proven, alternative: the use of its Rule 70 powers. At a minimum, the district court should be obligated to explain why other available methods of resolving the impasse are not feasible before imposing bankrupting fines on a municipality.[6]

---

[6] The City understands the district court's frustration in attempting to implement, without the active assistance of the Council, a remedy for the constitutional violations it has found. Nevertheless, nothing is gained by creating needless conflicts on matters that do not materially advance the goal of desegregating the City. Certainly, no one can seriously contend that the public spectacle of last summer created by the contempt order did anything to advance the remedial goals of the district court. It is therefore vital to the successful implementation of the short- and long-term plans that the court act with discretion and simply do what is necessary to implement the plans without regard to any personal animosity that may exist.

2. The district court also had available another, more comprehensive, but nevertheless less financially devastating alternative to the invocation of its contempt power: it could have appointed a "commission" to take over the City Council's functions in implementing the housing remedy. That solution was raised by the district court, on its own initiative, on July 12, and then again on July 26, 1988. See *supra*, 4-5. The court asked the parties to offer their comments on the possibility of appointing a Yonkers Affordable Housing Commission ("Commission") to take over the functions of the City Council as they relate to the implementation of the Housing Remedy Orders. On July 12, the district court read into the record a description of the powers and responsibilities of the Commission and invited comment by all parties on its proposal. After receiving comment from the parties, the district court on July 28 circulated its own proposed Order, and once again invited comment by all parties for the August 2, 1988, contempt hearing. But, inexplicably, on August 2, the court did not even entertain discussion of the Commission proposal. Instead, it proceeded to hold the City and four of its Council members in contempt of the July 26 Order.

During the course of the proceedings in this case, the City has taken seemingly inconsistent positions with respect to the Affordable Housing Commission. Those inconsistencies, however, can be explained. Initially, the City opposed the planned creation of the Commission on the ground that deeming the necessary legislation to have been enacted was a completely effective solution to the immediate remedial problem. Thus, there was no need to circumvent the City Council process in *all* respects. The City believed that such a position was strongly supported by basic federalism limitations upon a district court's equitable authority. See *Rizzo* v. *Goode*, 423 U.S. 362 (1976). Only if the district court found that removal of the City Council was absolutely necessary to permit

timely implementation of the remedial decrees could such an extraordinary step be taken.

After the City learned that the only alternative to the Commission that the district court would entertain was contempt, and the City was confronted with bankrupting fines, the City's willingness to accept a Commission increased significantly. Given the alternative of being forced into bankruptcy or having to accept a modification of its governmental structure, the City opted for the latter choice. Nevertheless, the City continued to maintain that deeming the legislation to have been enacted was the most appropriate remedial solution to the problem.

The City's position now is that the Commission remains a possible solution to future problems. But it is not a solution that this Court needs to consider at this time. Now that the immediate crisis has ended and implementation of the district court's remedial orders is moving apace, there is no reason to divest the City Council of its legislative functions. The point of discussing the Commission is simply to show that the district court had available to it alternatives to contempt, which were less destructive to the City but more effective in implementing the district court's remedial decree. In declining either to adopt one of those alternatives or to explain why they were inadequate, the district court abused its discretion by ordering contempt sanctions to be imposed.

III. The District Court's Premature Use Of Its Contempt Power Was Not Justified Simply Because It Purported To Enforce A Consent Decree.

The court of appeals rejected these arguments by observing that the contempt sanctions were imposed by the district court to enforce a consent decree. Under this reasoning the contempt sanction was narrowly tailored because it responded only to disobedience to a commitment previously entered into by the Council and the City. But the consent decree adds nothing to the case. There

is no question that the district court had equitable authority to order the City Council to take the necessary steps to implement its desegregation decree and remedial orders. If the Council members had refused to comply with such an order, then the question of how to implement the desegregation decree in the face of their recalcitrance would have been precisely the same issue the district court resolved here and the restrictions upon the district court's use of equitable authority would have been the same.

The contractual aspects of a consent decree simply do not expand the district court's equitable power. The City did not agree in the decree to allow the district court to hold it in contempt as a remedy for the decree's breach. Thus, all a breach of that agreement means is that the City loses the benefit of the bargain it has struck. It in no way confers upon the district court some additional authority to use its contempt powers to enforce the decree.

In fact, by suggesting that civil contempt sanctions are somehow more appropriate for enforcing consent decrees than judgments entered following contested proceedings, the court of appeals' logic creates a disincentive for any litigant to enter into a consent decree. That is particularly true in cases involving structural litigation, such as housing and school desegregation issues, where the remedial phase of the litigation is likely to be lengthy and, in many instances, contested.

Moreover, the reasoning of the appellate court ignores the well-established proposition that civil contempt sanctions are not intended to provide vindication of the district court's authority:

> Criminal contempt sanctions are punitive in nature and are imposed to vindicate the authority of the court. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947). On the other hand, sanctions in

> civil contempt proceedings may be employed "for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained."

Id. at 303-304 (citations omitted); *Sheet Metal Workers* v. *EEOC*, 478 U.S. at 421, 443 (1986). In *Sheet Metal Workers*, this Court affirmed sanctions for civil contempt which created a training fund for apprentices and the appointment of an administrator because the sanctions compensated the victims of the union's discriminatory conduct. Here, by contrast, the fines imposed against the City were of such a magnitude that they were unquestionably punitive; they punished the City, its employees, citizens and bondholders (which was precisely what the United States asked the court to do) for the refusal of four Council members to comply with the court's order. Moreover, the payment of the fines themselves had no remedial purpose connected to the long-term housing plan, as embodied in the consent agreement. *United States* v. *Paradise*, 480 U.S. 149 (1987) (enforcing consent decree with affirmative action requirements instead of contempt fines); *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d at 1237, *cert. denied*, 108 S.Ct. 2821 (1988). Accordingly, the district court had no basis for threatening to bankrupt the City simply for breaching a contract. Remedies for that breach remain subject to the same equitable principles restricting the court's use of contempt only as a last resort.

In sum, the district court erred by resorting prematurely to the use of contempt sanctions. This kind of error could become an especially acute problem in the future if the Court holds that individual Council members cannot be held in contempt for their official acts. Given such immunity, the likelihood that Council members would choose, for political, personal or other reasons, to defy orders of the district court might increase, leaving the City in a vulnerable position which it is power-

less to avert. Under these circumstances, the City urges the Court to decide this case on the narrowest ground available, *viz.*, that the district court abused its discretion by failing to consider fully whether any feasible and less onerous remedial measures existed before employing the power of contempt.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

STANLEY R. STRAUSS
MICHAEL W. SCULNICK
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
One Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1880

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
KEVIN L. KIMBALL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

PAUL W. PICKELLE
Corporation Counsel
City of Yonkers
Yonkers City Hall
Yonkers, New York 10701
(914) 964-3205

Counsel for Respondent

April 20, 1989

* Counsel of Record

(9) (13) (9)

Nos. 88-854, 88-856 and 88-870

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE,
Petitioner,
— against —
UNITED STATES OF AMERICA, *et al.*,
Respondents,
— and —
PETER CHEMA,
Petitioner,
— against —
UNITED STATES OF AMERICA, *et al.*,
Respondents,
— and —
NICHOLAS LONGO and EDWARD FAGAN,
Petitioners,
— against —
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writs of Certiorari To The United States Court of Appeals For The Second Circuit

JOINT APPENDIX

ANTHONY J. MERCORELLA†
JAMES L. FISCHER
VINCENT R. FONTANA
VINCENT R. CAPPUCCI
Attorneys for Petitioner Henry G. Spallone

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
420 Lexington Avenue
New York, New York 10170
(212) 490-3000

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

†Counsel of Record

Dated: April 20, 1989

(For Further Appearances See Inside Cover)

PETITIONS FOR CERTIORARI FILED NOVEMBER 23, 1988
CERTIORARI GRANTED MARCH 6, 1989

JAMES D. HARMON, JR.†
BARRY G. SABETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN
Attorneys for Petitioner Peter Chema
BOWER & GARDNER
110 East 59th Street
New York, New York 10022
(212) 751-2000
†*Counsel of Record*

LAWRENCE R. SYKES
Counsel of Record for Petitioners Nicholas Longo and Edward Fagan
Two William Street
White Plains, New York 10601
(914) 428-1408

Of Counsel:
WILLIAM GREENBERG
Two William Street
White Plains, New York 10601
(914) 428-1408

GROVER G. HANKINS
Counsel of Record for Yonkers Branch NAACP, et al.
NAACP Special Contribution Fund
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

Of Counsel:
MICHAEL H. SUSSMAN
SUSSMAN & SUSSMAN
30 South Broadway
Yonkers, New York 10701
(914) 968-4558

JOINT APPENDIX

TABLE OF CONTENTS

Page

(i) Relevant Docket Entries In The Courts Below

Portions of the Docket Sheet of the United States Court of Appeals, Second Circuit 1

Portions of the Docket Sheet of the United States District Court, Southern District of New York* 5

(ii) Any Relevant Pleading, Jury Instruction, Finding, Conclusion or Opinion

Opinion of the United States Court of Appeals, Second Circuit, filed on August 26, 1988 (Newman, C.J.)**

(iii) Judgment, Order or Decision in Question

Judgment of Affirmance of United States Court of Appeals, Second Circuit, filed August 26,

---

* Pursuant to Supreme Court Rule 30.1, those relevant entries in the district court docket already reproduced in the petition for *certiorari* of petitioner Spallone at A189n-A202n are not again reproduced herein.

** Pursuant to Supreme Court Rule 30.1, the Opinion of the Second Circuit filed on August 26, 1988 which is already reproduced in the petition for *certiorari* of petitioner Spallone at Ala-A35a and in the petition for *certiorari* of petitioner Chema at 1e-35e is not again reproduced herein.

Page

1988 and Issued as Mandate on September 2, 1988***

(iv) Other Parts of the Record to Which the Parties Wish to Direct the Court's Attention

Order (Sand, J., May 28, 1986) 19

Portions of Minutes of District Court Proceedings (Sand, J., April 9, 1987)..... 35

Portions of Minutes of District Court Proceedings (Sand, J., April 21, 1987)..... 47

Yonkers City Council Resolution, Exhibit "C" to District Court Proceedings (Sand, J., April 21, 1987)..... 65

Motion by City of Yonkers to Modify Housing Remedy Order, Dated May 8, 1987 69

Portions of Minutes of District Court Proceedings (Sand, J., May 12, 1987)..... 79

Minutes of District Court Proceedings (Sand, J., June 23, 1987)..... 102

Minutes of District Court Proceedings (Sand, J., July 9, 1987)..... 109

Order (Sand, J., July 10, 1987)..... 137

*** Pursuant to Supreme Court Rule 30.1, the Judgment of Affirmance of the United States Court of Appeals for the Second Circuit filed on August 26, 1988 and issued as Mandate on September 2, 1988 which is already reproduced in the petition for *certiorari* of petitioner Spallone at A187m is not again reproduced herein.

Page

Portions of Minutes of District Court Proceedings (Sand, J., July 15, 1987)..... 153

Minutes of District Court Proceedings (Sand, J., January 19, 1988)..... 169

Minutes of District Court Proceedings (Sand, J., January 25, 1988)..... 190

Minutes of District Court Proceedings (Sand, J., January 28, 1988)..... 207

First Remedial Consent Decree in Equity, Dated January 28, 1988..... 216

Motion by City of Yonkers to Vacate Consent Decree, Dated May 2, 1988..... 225

Memorandum of City of Yonkers in Opposition to Joint Motion to Enter Long Term Plan Order, Dated May 16, 1988 245

Minutes of District Court Proceedings (Sand, J., May 19, 1988)..... 262

Portions of Minutes of District Court Proceedings (Sand, J., June 8, 1988)..... 275

Long Term Plan Order (Sand, J., June 13, 1988)..... 303

Resolution of Yonkers City Council, Adopted June 14, 1988 317

Letter from Brian Heffernan, Esq. to Michael Sculnick, Esq., Dated June 20, 1988 320

Page

Minutes of District Court Proceedings (Sand, J., June 21, 1988)..... 322

Yonkers City Council Agenda Item No. 14A, Dated June 28, 1988 345

Order (Sand, J., June 29, 1988)..... 347

Memorandum of Law of City of Yonkers in Opposition to Proposed Order, Dated July 11, 1988..... 349

Minutes of District Court Proceedings (Sand, J., July 12, 1988)..... 354

Comments of the City of Yonkers on Proposed Yonkers Affordable Housing Commission, Dated July 25, 1988..... 377

Minutes of District Court Proceedings (Sand, J., July 26, 1988)..... 380

Order (Sand, J., July 26, 1988) 397

Letter of Judge Sand, Dated July 28, 1988..... 401

Minutes of District Court Proceedings (Sand, J., August 2, 1988)..... 402

Order Adjudging Peter Chema, Nicholas Longo and Edward Fagan in Contempt (Sand, J., August 2, 1988) 445

Order Adjudging City of Yonkers in Contempt (Sand, J., August 2, 1988) 448

Order (Sand, J., August 3, 1988) 451

Page

Minutes of District Court Proceedings (Sand, J., August 4, 1988) 452

Peter Chema's August 4, 1988 Notice of Appeal of District Court's August 2, 1988 Order 492

Order Adjudging Henry G. Spallone in Contempt (Sand, J., August 5, 1988)..... 494

Henry Spallone's August 8, 1988 Notice of Appeal of District Court's August 5, 1988 Order 497

Decision and Order of United States Court of Appeals, Second Circuit, Dated August 9, 1988..... 499

Peter Chema's August 10, 1988 Notice of Appeal of District Court's July 26, 1988 Order..... 501

Affidavit of James Harmon Requesting Stay of Judgment, Dated August 16, 1988 502

Affidavit of Peter Chema, Dated August 17, 1988..... 505

Order of United States Court of Appeals, Second Circuit, Containing Stay and Reserving Decision, Dated August 17, 1988..... 510

Order of the United States Supreme Court on Motions for Stay with Dissenting Opinion, Dated September 1, 1988..... 512

Minutes of District Court Proceedings (Sand, J., September 2, 1988)..... 523

Page

Yonkers Resolution No. 13-1988 Adopting Affordable Housing Ordinance, Dated September 9, 1988 528

Affordable Housing Ordinance of the City of Yonkers, Dated September 9, 1988 531

Minutes of District Court Proceedings (Sand, J., September 14, 1988) 557

Opinion of United States Court of Appeals, Second Circuit, Dated September 22, 1988 578

Order Threatening Further Contempt Sanctions Against the City of Yonkers (Sand, J., October 25, 1988)..... 615

Order Directing Acquisition of Sites (Sand, J., November 23, 1988)..... 620

Order of United States Supreme Court Granting Certiorari, Dated March 6, 1989..... 622

Amended Order of United States Supreme Court Granting Certiorari, Dated March 6, 1989..... 624

Portions of the Docket Sheet of the United States Court of Appeals, Second Circuit

CASE NO. 88-6178 USA V. YONKERS BD. OF ED. ET AL.

Date	Filings--Proceedings
8-3-88	Appellant CITY OF YONKERS Motion for Stay of Contempt Sanctions, FILED (W/PFS). (Original and 3 Copies with Calendar Section).
8-3-88	Appellant CITY OF YONKERS Memorandum of Law in Support of Stay of Contempt Sanctions, FILED.
8-3-88	Appellees YONKERS BRANCH - NAACP ET AL Opposition to Application by the City of Yonkers For Stay of Findings of Contempt and imposition of Sanctions, FILED
8-3-88	Copy of district court transcript dated 8-2-88 @ 10AM, FILED.
8-3-88	Copy of district court docket entries and Notice of Appeal on behalf of the appellants CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY, FILED.(RE: 88-6178).
8-4-88	Appellee USA statement in opposition to appellants motion for stay, FILED. (orig & copies w/Cal).
8-8-88	Movant SPALLONE, Motion for Stay of contempt sanctions, Filed. (ORIG: and 3CC's W/CAL) (RE:88-8)

Date	Filings -- Proceedings
8-8-88	Memorandum of law in support of motion for a stay, Filed. (ORIG: and 3CC'S W/CAL) (re: 88-8072)
8-8-88	Movant SPALLONE, Form C, received. (RE: 88-8072)
8-8-88	Movant SPALLONE, Form D, Received. (RE: 88-8072)
8-8-88	Movant CHEMA, Motion for stay pending appeal, Filed. (ORIG: and 3CC'S W/CAL) (RE: 88-8074)
8-8-88	Memorandum of law in support of motion for stay, Received.(ORIG: and 3CC'S W/CAL) (RE:88-8074)
8-8-88	Movant CHEMA, Motion for permission to submit a memorandum of law exceeding ten pages, filed. and 3CC'S W/CAL) (re:88-8074)
8-8-88	Affidavit in support of PETER CHEMA, Motion for stay, filed. (ORIG: and 3cc's W/CAL) (re:88-80)
8-8-88	Movants NICHOLAS LONGO and EDWARD FAGAN, Motion for stay of contempt sanctions, Filed. (ORIG: and 3cc's W/CAL) (Re: 88-8076)
8-8-88	Appellees YONKERS BRANCH, NAACP ET AL, Opposition papers to motions for stay, Filed (ORIG: and 3 CC's W/CAL) (RE:88-6178)

Date	Filings -- Proceedings
8-8-88	Order granting CHEMA, Motion for permission to submit a memorandum of law exceeding ten pages, Filed. (BY:LC) (RE:88-8074)
8-8-88	Movant CHEMA Memorandum of law in support of motion for stay, Filed.(RE:88-8074)
8-8-88	UNITED STATES Opposition to motions of Yonkers city councilmen for a stay pending appeal, filed (FOR: 88-6178, 88-8072, 88-8074, 88-8076)
8-9-88	Appellant CITY OF YONKERS REPLY MEMO OF LAW IN SUPPORT OF STAY OF CONTEMPT SANCTIONS, FILED.
8-9-88	Appellant CITY OF YONKERS et ano form C, Filed. (re: 88-6178)
8-9-88	Appellant CITY OF YONKERS et ano form D, Filed. (re: 88-6178)
8-9-88	ORDER granting motions for stay as of this date and further notion that the stay shall continue only until the appeals are argued on Wed., 8-17-88 @2PM, further noting that the briefs of all parties are to be filed by 12NOON on Mon., 8-15-88, FILED. (Before: WF, JON, JDM w/JON dissenting)
8-10-88	Appellant CITY OF YONKERS letter requesting clarification filed (per WF)
8-9-88	Certified copy of the order filed on 8-9-88 issued to the district court, S.D.N.Y.

Date	Filings -- Proceedings
8-10-88	Copy of district court docket entries (partial) and Notice of Appeal on behalf of the appellant HENRY SPALLONE, FILED.(re:88-6178)
8-11-88	Copy of district court docket entries (partial) and Notice of Appeal on behalf of the appellant PETER A. CHEMA, FILED.(re:88-6188). James L. Fischer, Esq. WILSON, ELSER, MOSKOWITZ EDELMAN & DICKER 420 Lexington Avenue New York, New York 10170 (212) 490-3000 (FOR: HENRY SPALLONE) James D. Harmon, Jr., Esq. BOWER & GARDNER 110 East 59th Street New York, New York 10022 (212) 751-2900 (FOR:PETER CHEMA) Lawrence R. Sykes, Esq. 20 South Broadway Yonkers, New York 10701 (914) 965-5400 (FOR:NICHOLAS LONGO and EDWARD FAGAN)
8-11-88	Copy of district court docket entries (partial) and Notice of Appeal on behalf of the appellants NICHOLAS LONGO and EDWARD FAGAN, FILED.(re:88-6190) (FEE PAID per SDNY)

Date	Filings -- Proceedings
8-11-88	Order in response to appellants letter requesting clarification filed (WF, Ch. J. JON, JDM, CJJ.)
8-11-88	Record on Appeal field (original papers of the district court)
8-12-88	Notice of Entry of an Order duly entered in the office of the clerk of the court of appeals, filed
8-15-88	Appellant CITY OF YONKERS brief filed
8-15-88	Appellee Yonkers Branch, NAACP, et al. Brief filed
8-15-88	Appellant Henry Spallone brief filed
8-15-88	appellant Peter Chema brief filed
8-15-88	Appellant Peter Chema appendix filed
8-15-88	Appellee USA brief filed
8-15-88	Appellants Nicholas Longo and Edward Fagan brief filed
8-15-88	Appellants appendix filed
8-16-88	Letter of Mr. Kenneth Brown filed (per WF)
8-16-88	Appellant SPALLONE reply brief received (w/pfs)
8-17-88	Appellant CHEMA reply brief received (w/pfs)

Date	Filings -- Proceedings
8-17-88	Appellant CHEMA motion for extension of stay of contempt sanctions, stay of 7-26-88 filed (w/pfs)
8-17-88	Case heard before NEWMAN, MINER, MAHONEY, C.JJ.
8-17-88	Order that the motion to extend the stay of contempt sanctions be and it hereby is granted until further order of the court. The request to stay the District Court's order of July 26, 1988 is taken under advisement; the court reserves decision on the merits of the appeal, filed (JON RJM JDM, C.JJ.) Transcript of oral argument of motion heard August 9th, 1988, filed
8-22-88	Certified copy of order issued to SDNY
8-22-88	Copy of district court docket entries and amended notice of appeal on behalf of appellant CHEMA, filed (88-6188 only)
8-26-88	Judgment affirmed as to the council members; affirmed, as modified as to the City. Direct that issuance of our mandate be stayed for seven days from the date of this decision to permit application to the Supreme Court or a Justice thereof for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. Unless a stay is granted by the Supreme Court or a Justice thereof, our mandate shall issue seven days from the date of this decision and our prior stay of the contempt sanction shall at that time be vacated, filed (JON RJM JDM)

Date	Filings -- Proceedings
8-26-88	Judgment Filed
9-1-88	Appellant City of Yonkers motion for further stay of civil contempt sanctions, filed
9-1-88	Appellant Henry Spallone motion for further stay of civil contempt sanctions, filed
9-2-88	Order that appellant Spallone's motion is withdrawn as moot in light of the action by Supreme Court. The City's motion of September 1 to this Court is hereby denied. FURTHER, the mandate is to issue forthwith. However, in light of the Supreme Court's orders of 9-1-88, we direct the District Court to stay the execution and enforcement of the mandate of this Court insofar as that mandate directs action to be taken with respect to council members. The result is that the daily fines against the City of Yonkers, resume as of today, and the daily fines and impending incarceration imposed upon council members are stayed pending the timely filing and disposition by the Supreme Court of petitions for writs of certiorari in accordance with the Supreme Court's orders of September 1, filed JON RJM JDM
9-2-88	Certified copy of order issued to district court
9-2-88	Mandate Issued (judgment and opinion)

Date	Filings -- Proceedings
12-05-88	Notice of filing of petition for writ of certiorari filed. (City of Yonkers, Petitioner Supreme Court # 88-855).
12-05-88	Notice of filing of petition for writ of certiorari filed (Nicholas Longo and Edward Fagan, Petitioners, Supreme Court # 88-870).
12-05-88	Notice of filing petition for writ of certiorari filed (Henry G. Spallone, Petitioner, Supreme Court #88-854).
12-05-88	Notice of filing of petition for writ of certiorari filed (Peter Chema, Petitioner Supreme Court #88-6178).
3-6-88	Certified copy of order of Supreme Court denying petition for writ of certiorari filed.
3-9-89	Certified copy of order of Supreme Court granting petition for writ of certiorari filed (SC # 88-854).
3-9-89	Certified copy of order of Supreme Court granting petition for writ of certiorari filed (SC # 88-856)
3-9-89	Certified copy of order of Supreme Court granting petition for writ of certiorari filed (SC # 88-870).

Portions of the Docket Sheet of the United States District Court, Southern District of New York

Sand, J.
80 Civ. 6761
5/20/88

PLAINTIFFS

UNITED STATES OF AMERICA

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Pltffs-Intervenors,

CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

3rd pty. pltf.,

DEFENDANTS

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

12-17-81 AMENDED COMPLT.,

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and SECRETARY OF HOUSING AND URBAN DEVELOPMENT.

3rd pty defts.

E.F.

Date		Filings -- Proceedings
9-21-88	936	Filed Order that Court's Order dtd 9-2-88 is declared inoperative and no force and effect be reinstated for good cause shown on the application of Bd. of ED.. Amount of ines held by Clerk of Court in Special Account, together with any interest accrued, shall be released by the Clerk and paid to the City of Yonkers upon the presentation of a copy of this signed Order served upon Clerk in Rm 18 and upon Cashier Rm 14.. Sand, J. cmc (cash) PA
9-27-88	937	Filed true copy of mandate order form the USCA 2nd cir. . . Ordered that the date for reinstatement of the appeal is ext to 10-31-88, if not reinstated by that date shall be deemed withdrawn with prejudice. . . Clerk, USCA 2nd cir. PA
9-30-88	938	Filed transcript of record of proceedings, dated 7-12-88.
9-30-88	939	Filed deft City of Yonkers' responses to Inquiries of Dist. Court. PA
10-3-88	940	Filed pltff-intervenors response to questions raised in directive of dist. court of 9-28-88.
10-4-88	941	Filed deft Yonkers Bd. of ED. Memorandum. PA
10-5-88	942	Filed US Dept of Justice, Civil Rights Div. comments with regard to public housing remedial process.

Date		Filings -- Proceedings
10-12-88	943	Filed deft City of Yonkers' demand for hearing regarding suitability of the Gramercy site.
10-12-88	944	Filed Order to Show Cause . . .parties are ordered to show cause at a hearing on 10-17-88 9:30 a.m. . . . why the first remedial consent decree in equity should not be amended . . . this amendment is severable from the consent decree. . . . So Ordered . . . Sand, J. cmc PA
10-25-88	945	Filed pltff Intervenors brief in support of entry of order requiring city to aquire Gramercy Ave. Site for construction of public housing. PA
10-25-88	946	Filed pltffs comments in regard to designation of Gramercy Site. PA
10-25-88	947	Filed Order that the Seminary site be removed as a site for construction of public housing. . . Gramercy site be designed as a site. . . failure of City of Yonkers to adhere to terms, etc. will subject the city to contempt proceedings. . . Upon a finding of contempt against the City of Yonkers for violation of this order or previous remedial orders of this court, to impose contempt fines on the City to commence at the fine level in existence. . . So Ordered. Sand, J. PA
11-1-88	948	Filed true copy of Mandate Order & Opinion from the USCA 2nd Cir. . . order of district court is affirmed in accordance with opinion of this court with cost to be

Date		Filings -- Proceedings
		taxed against the appellants. . . Clerk, USCA 2nd Cir. PA
11-3-88	949	Filed true copy of mandate order from the USCA 2nd Cir. . . date for reinstatement of appeal is ext to 12-29-88 and if not reinstated by that date shall be deemed withdrawn with prejudice. . . So Ordered. Clerk, USCA 2nd Cir. PA
11-3-88	950	Filed Order that the City may deduct charges for three hours of the Outside Housing Advisors time from his Sept. Statement. . . So Ordered. . . Sand, J. cmc PA
11-3-88	951	Filed Memo Order that application is denied. So Ordered. Sand, J. cmc PA
11-10-88	952	Filed transcript of record of proceedings dated September 28, 1988.
11-10-88	953	Filed transcript of record of proceedings dated September 14, 1988.
11-10-88	954	Filed transcript of record of proceedings dated August 4, 1988.
11-10-88	955	Filed transcript of record of proceedings dated August 2, 1988.
11-17-88	956	Fld. SUPERSEDING STIPULATION WITH LEAVE TO REINSTATE,... that the date for reinstatement of this appeal is extended to December 29, 1988, and if not reinstated by that date shall be deemed withdrawn with prejudice. SO ORDERED

Date		Filings -- Proceedings
		ELAIN B. GOLDSMITH, CLERK of U.S.C.A. MJ
11-23-88	957	Fld. Plaintiff-Intervenors' RESPONSE TO MONITOR'S STATUS REPORT WITH RESPECT TO NEGOTIATION WITH THE STATE OF NEW YORK.
11-23-88	958	Fld. ORDER,. . . . that if by the date that the RFP is ready for advertisement titles to the Helena Avenue, Wrexham Road and Clark Street sites have not passed to the City by eminent domain, then for purposes of the RFP, title to each site is deemed to have passed to the City and all impediments to title are deemed removed; the City is to make the Whitman School, School 4, Helena Avenue, Wrexham Road and Clark Street sites available at no cost for use by the developer selected by the Yonkers Municipal Housing Authority and approved by HUD to develop the housing units. SO ORDERED. Sand, J. cmc MJ
11-28-88	959	Filed deft City of Yonkers' response to monitors fact-findings and status report. PA
11-28-88	960	Filed deft Yonkers Bd. of Ed respond to monitors Report dtd 11-16-88. PA
12-5-88	961	Filed Order that the court will defer hearing the pending motion until it is advised that a maintenance of budget agreement between the City and the School Bd. has been consummated or that parties have concluded, after good faith negotiations overseen by monitor, they are unable to enter into such an agreement. . . Court

Date		Filings -- Proceedings
		will act promptly thereafter. . . So Ordered. . . Sand, J. cmc PA
12-15-88	962	Filed proposed intervenor Celwyn Co. Inc. affdvt & Notice of Motion for leave to intervene as pty deft. RET: 12-29-88 PA
12-15-88	963	Filed proposed intevenor Celwyn Co. Inc. memo of law in support of #962. PA
12-19-88	964	Filed transcript of record of proceedings dated 9-2-88.
12-19-88	965	Filed transcript of record of proceedings dated 10-4-88.
12-19-88	966	Filed transcript of record of proceedings dated 10-12-88.
12-19-88	967	Filed transcript of record or proceedings dated 10-17-88.
12-20-88	968	Filed Order that the amount of fines held by the Clerk of the Court in the Special Account, together with any interest accrued, less a Court fee of 1.5% computed on the interest only, shall be released by the Clerk and paid to the City of Yonkers upon the presentation of a copy of this signed order served upon the Clerk in room 18 and upon Cashier in Room 14. . . Sand, J. cmc PA.
12-20-88	---	Filed Amended Order #968. . . That the amount of fines held by the Clerk of the Court in the Special Account, together with any interest accrued, less a court fee of 1.5% shall be released by the Clerk and

Date		Filings -- Proceedings
		paid to the City of Yonkers upon the presentation of a copy of this order signed and served upon the clerk in Room 18 and upon the Cashier in room 14. . . Sand, J. cmc PA
12-21-88	---	received ck # 238684 dtd 12-21-88 in the amount of $362,703.84 payable to City of Yonkers.
12-27-88	969	Filed pltff/intervenor affirmation and Notice of Motion & Motion for attys' fees and costs. RET: 1-12-89. PA
12-29-88	970	Filed order that the court will hear pltff-intervenors' motion to add the proposed State of NY Defts as parties in the captioned matter on 1-19-89. . . Ordered. . . Sand, J. cmc PA
1-3-89	971	Filed pltff-Intervenors' brief in opposition to Celwyn Co. Inc's motion to intervene. PA
1-3-89	972	Filed true copy Stip from the USCA 2nd cir. Appeal has been withdrawn w/o prejudice. Subject to reinstatement. . . Ext. to 3-1-89. So Ordered. . . Clerk, USCA 2nd Cir. PA
1-5-89	973	Filed deft City of Yonkers' memo of law in opposition to intervenors' motion for atty's fees and in support of proposed order of the city of Yonkers. PA
1-5-89	974	Filed true copy of mandate Stip from the USCA 2nd cir. . . Date for reinstatement

Date		Filings -- Proceedings
		of appeal is ext. to 3-1-89. . . Clerk, USCA 2nd cir. PA
1-10-89	975	Filed US Dept. of Justice, civil rights div. response to US to motion of Celwyn Co. Inc. for leave to intervene as pty deft. PA
1-10-89	976	Filed Movant Celwyn Co. Inc. reply to response of US to Movants motion for leave to intervene as a pty pltff. PA
1-10-89	977	Filed pltff Intervenors reply brief in support of attys fees and costs. PA
1-11-89	978	Filed true copy of mandate order from the USCA 2nd cir. Ordered. That petition is denied. . . Clerk, USCA 2nd Cir. PA
1-12-89	---	Filed Memo endorsed on #962. . . Motion granted to the extend and for reasons set forth in the transcript of proceedings this date. . . So Ordered. . . Sand, J. cmc PA
1-17-89	979	Filed proposed defts suppl. memo of law in opposition to motion to join them as parties and to amend pleadings to assert claims against them. PA
1-17-89	980	Filed deft City of Yonkers memo of law with respect to motion to implead NYS. PA (NP 1-17-89 5:34p)
1-20-89	---	Filed Memo Endorsed on motion dtd 9-17-87. . . Motion granted. See transcript this date. . . So Ordered. . . Sand, J. cmc PA

Date		Filings -- Proceedings
1-20-89	---	Filed memo endorsed on motion dtd 9-24-87 Motion granted. . . See transcript this date. . . So ordered. . . Sand, J. cmc PA
1-20-89	981	Fld order, for the reasons stated. . . Pltfs application for an upward adj is denied of the rate of $175 per hour because it is believed that rate is adequate. . . Intervenors entitlement to recovery of fees is no longer contingent. . . The allocation of fees award of 90% to City, 10% to the YBE is unopposed and adopted. . . Sand, J. cmc LA
2-7-89	982	Filed Dept of Housing & Urban Development response to motion of Celwyn Co. Inc. PA
2-7-89	983	Filed pltffs response to affdvt & Motion of pltff-Intervenor Celwyn Co. Inc. concerning Gramercy Site costs.
2-7-89	984	Filed Order that within 30 days, City of Yonkers remit to counsel for pltff Intervenor the sum of $77,242.84 in atty fees and costs and Yonkers Bd. of Ed. remit to counsel for pltff-intervenors the sum of $8,083.51 in attys fees and costs. . . So Ordered. . . Sand, J. cmc PA
2-7-89	985	Filed deft City of Yonkers memo of law in opposition to motion by Celwyn Co. Inc. PA
2-10-89	986	Filed second amended complt.

Date		Filings -- Proceedings
2-16-89	987	Filed transcript or record of proceedings dated 12-9-88.
2-21-89	988	Filed pltffs final comments concerning designation of the Gramercy site for public Housing construction. PA
2-23-89	989	Filed Order that the listed magnet program additions and revisions are approved and be implemented by the start of the 1989-90 school year. . . Sand, J. PA
2-28-89	990	Fld. Summons with Returns of Service of Summons & Complaint. Served: N.Y. State Urban Development Corp By: Debbie Vansise Esq. on 2/16/09. N.Y. State Dept. of Law By: Florence Wilson (office of M. Buchbiader, Atty) on 2/16/89 Yonkers Board of Ed.
3-3-89	991	Filed Yonkers Board of Ed. affdvt of service, served FirstReq. of Yonkers Bd. of Ed for document production upon: Gov. Mario Cuomo; State of NY; NY State Dept. of Ed.; Bd. of Regents; Comm. of Ed. By: Florene Wilson on 2-16-89. PA
3-3-89	992	Filed Yonkers Bd of Ed affdvit of service, served Cross claim upon: Urban Dev. Corp NYS; Vincent Tese; By: Debbie Vansise on 2-16-89.
3-3-89	993	Filed Yonkers Bd. of Ed. affdvt. of service servied Cross claim upon: Gov. Mario

Date		Filings -- Proceedings
		Cuomo; State of NY; NY State Dept of Ed; Bd of Regents; Comm. of Ed; by: Florene Wilson on 2-16-89.
3-3-89	994	Filed Order that an application has been made by counsel for Celwyn Co. Inc. to stay of this court's order directing City of Yonkers to proceed with condemnation of certian property owned by Celwyn. . . Application is denied. . . So Ordered. . . Sand, J. cmc PA
*2-24-89	995	Filed Order granting application to refund clerks assessment of 1/5% on interest bearing accounts. . . Clerk refund $1,231.72 and pay to City of Yonkers. . . Sand, J.Received check 744832 dated 3-1-89 ... in the amount of $1,231.72 payable to City of Yonkers
3-1-89		Received check 244832 dated 3-1-89... in the amount of $1,231.72 payble to City of Yonkers.
3-13-89	996	Filed Stip & Order that the time for added defts to answer NAACP's second amended complt & Board's cross claim is ext to 4-17-89. . . So Ordered. . . Sand, J. PA
3-10-89	997	Filed pltff/Intervenor Celwyn Notice of Appeal to the USCA 2nd cir. from order dtd 3-3-89. (received in unit 3-15-89)
3-15-89	---	mailed copies of Notice of Appeal to: Sussman & Sussman. . . Brian Heffernan. . . Butzel, Long, Gust, Klein & Vanzile. . . Raymond Larizza. . .

Date		Filings -- Proceedings
		Vedder, Price. . . Kaufman, Kammholz & Day.
3-15-89	---	Forwarded copy of Notice of Appeal to Dist. Judge & copies of Notice of Appeal & docket entries to Court of Appeals.
3-15-89	998	Filed Supplemental Order that Order dtd 3-3-89 is amended to the application for a stay is denied for the reasons set forth on the transcript of proceedings held 2-23-89. . . So Ordered. Sand, J. cmc PA
3-20-89	999	Filed transcript of record of proceedings dated 1-22-89.
3-23-89	1000	Filed true copy of Superseding Stip with leave to reinstate from the USCA 2nd cir. . . That the date for reinstatement of appeal is ext to 4-24-89 and if not reinstated by that date be deemed withdrawn with prejudice. . . Clerk USCA 2nd Cir. cm PA
3-23-89	1001	Filed true copy of Notice of Motion by pltff Intervenor for stay of order and prel. injunction pending appeal. . . Motion is denied . . . and the appeal is expedited. . . Appellant file the record, brief and jt appendix by 4-10-89. . . Appeal set for oral argument during week of 4-19-89. . . Clerk, USCA 2nd cir. cm
3-24-89	1002	Filed deft City of Yonkers affdvt and Motion for reconsideration of order directing City to acquire 7.73 acres of Gramercy Site. RET: 3-30-89. PA

Date		Filings -- Proceedings
3-24-89	1003	Filed deft City of Yonkers memo of law in support of #1002. PA
3-29-89	1004	Filed pltffs response to City of Yonkers motion for reconsideration of order directing acquisition of 7.73 acres of Gramercy site. PA
3-29-89	1005	Filed pltff-Interveor Yonkers Branch NAACP opposition to city's motion for reconsideration of order directing the city to acquire 7.73 acres of Gramercy site. PA
*3-28-89	1006	Filed Order that beginning 1989-90 school year YBE convert Emerson, Twain and Burroughs from schools serving grades 7-9 to schools serving grades 7-8, etc. . . Sand, J. cmc PA
3-29-89	1007	Filed pltff Intervenors Notice of appearance by counsel. AJL PA
3-30-89	1008	Filed proposed Intervenor Paralax Development Ind. Inc. affdvt & Notice of motion to intervene. RET: 3-30-89 PA
3-30-89	1009	Filed proposed Intervenor Paralax Development Ind. inc. affdvt of Theodore Powers real estate expert. PA
3-30-89	1010	Filed proposed Intervenor Paralax Development Ind. Inc. affdvt of Robert Killius, Director of Northeastern Regional Office of Casco Corp. Assoc. PA
3-30-89	1011	Filed proposed Intervenor Paralax Development Ind. Inc. memo of law in support of #1008.

Date		Filings -- Proceedings
3-31-89	1012	Filed Stip that the record on Appeal to the USCA of 2nd cir shall be limited to those documents appearing on the docket sheets commencing with the entry for 12-7-87 and continuing forward to the end of the docket sheets. . . PA
*3-29-89	1013	Filed pltff Intervenor Celwyn Co. Inc. affdvt of Julius Cohn in opposition to motion made by city of Yonkers. PA
*3-29-89	1014	Filed pltff Intervenor Celwyn Co. Inc. memo of law in opposition to motion made by City of Yonkers. PA
3-31-89	1015	Filed Notice that original record of appeal has been transmitted to the USCA 2nd Cir. PA
4-5-89	1016	Filed true copy of mandate order from the USCA 2nd Cir. Date for reinstatement of appeal is ext to 4-24-89, if not reinstated by date be deemed withdrawn with prejudice. . . Clerk, USCA 2nd Cir. cm PA

Order (Sand, J., May 28, 1986)

UNITED STATES v. YONKERS BD. OF EDUC.
Cite as 635 F. Supp. 1577 (S.D.N.Y. 1986)

UNITED STATES of America, Plaintiff.
and
Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court,
S.D. New York.

May 28, 1986.

U.S. Dept. of Justice, Washgton, D C . Joshua P. Bogin. Kenneth Barnes, Michael I. Barrett, Sarah Vanderwicken, for plaintiff U.S. Civil Rights Div.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, New York City, Michael W. Sculnick, Gerald S. Hartman, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, Detroit, Mich., John B. Weaver, John H. Dudley, Mark T. Nelson, Hall, Dickler, Lawler, Kent & Howley, New York City, Paul Whitby, for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civil Div., Raymond M. Larizza, Calvin E. Davis, Kirk Victor, John W. Herold, Office of Litigation, U.S. Dept. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

HOUSING REMEDY ORDER

SAND, District Judge.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the l)basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. Fair Housing Resolution and Office

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair housing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable. The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying

out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

"1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

"2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

"3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers,

local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

"4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

"5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there. The affirmative marketing plans shall be consistent with the occupancy priorities provisions (n VII) of this Order.

"6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment date, plans for housing

and school program development and other information relevant to the remedial process is available to both the Board and the City.

"7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private non-profit agencies. The FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof."

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. *Public Housing Unit*

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG"~ funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984-85 CDBG entitlement grant up to its full amount unless the City. submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984-85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98-45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City is hereby ordered to submit the required documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984-85 program year and other

documentation required by 24 C.F.R 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984-85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall ad-
the owner under which the owner (or developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. §941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by vise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (e.g., in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their

proposed development by providing the following incentives:

(i) write down of the site price of City owned land;

(ii) finance surveys, market analyses and other similar preconstruction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing in such ratio (e.g., 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units

by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (e.g., the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisition of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are currently available or which become available during the pendency of this Order.

IX. *Notice*

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. *Jurisdiction*

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an

objection is made with sufficient particularity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

Portions of Minutes of District Court Proceedings
(Sand, J., April 9, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v. 80 Civ. 6761

YONKERS BRANCH, NAACP,

Plaintiff-Intervenor,

v.

CITY OF YONKERS,
YONKERS BOARD OF EDUCATION,

v.

SAMUEL R. PIERCE, JR., et al.,

Defendants.

----------X

April 9, 1987
2:00 p.m.

Before:

HON. LEONARD B. SAND,
District Judge

APPEARANCES

SARAH VANDERWICKEN
Attorney for Department of Justice

MICHAEL SUSSMAN
Attorney for Plaintiff-Intervenor

BUTZEL LONG GUST KLEIN & VAN ZILE
Attorneys for Yonkers Board of Education

MARK T. NELSON
of Counsel

VEDDER PRICE KAUFMAN KAMHOLZ & DAY
Attorneys for the City of Yonkers

MICHAEL SKULNICK

-and-

JAY HASHMALL
Corporation Counsel for the City of Yonkers

RAYMOND M. LARIZZA
Attorney for U.S. Department of HUD

(Case called)

THE COURT: I called this conference because I had been advised by Mr. Newman, who has been appointed as the outside housing adviser by an order of this Court, that there had been some developments as to which the Court and all the parties should be informed. I suppose the simplest thing, Mr. Newman, is for you to make an interim status report.

MR. NEWMAN: Shall I use the microphone there?

THE COURT: Whatever you're most comfortable with.

MR. NEWMAN: Well, if the people can hear me, I'll just stand here.

I have been over the past few weeks, your Honor, looking for alternative sites or rather additional sites, additional to

Whitman and School 4, with the idea that if enough sites could be found and found in various parts of Yonkers, that perhaps it would ot be necessary to put as many units on Whitman in particular and on School 4 and that a more even distribution of the public housing units could take place.

I was working under a deadline, not wanting to see any delay in the issuance of the School 4-Whitman sites. But nevertheless working under that time constraint, I was able to find at least half a dozen other sites that meet many of the required criteria of HUD -- close to schools, shopping and mass transportation.

In addition, I have been working with, meeting with local clergy in trying to assess the situation and feelings in Yonkers and also to try to work with them in persuading them that a more ordered and community acceptable solution be devised, but most importantly if you could find a way to get the community to accept this order and work positively to see to its implementation.

And further to that, I have in recent days met with a total of some 35 heads of housing organizations, homeowners associations, co-op owners associations that represent collectively tens of thousands of residents. I have explained, perhaps for the first time to them, the ultimate assurance that the order is in fact being implemented and will be implemented and that the appeals at best delay this and that they should work for their own purpose in helping to define a remedy that they can live with and see easily and acceptably implemented.

I have had very good responses from these resident groups. This is not to say that they did not express very vehemently their innocence and that they felt put upon, but they understood that this order would be implemented, that this is what they would have to live with and that they should now work together to try to find a way to do it so that it is evenly -- each part of the community shares in the integration and that it be an ordered and acceptable one rather than one in an

atmosphere of reproach and violence from the street elements. This has been positive.

I have also been working with the councilmen, meeting with them individually and often with groups of clergy from the major denominations and from the various areas, and I have to say that the clergy have been particularly helpful, both the rabbinical clergy and the Catholic clergy and the Protestant clergy, in bringing reason to these meetings and a request for less of the vehement rejection that has taken place before. And I feel that I have won a good many of the councilmen over.

In the past couple of days, your Honor, the city prepared a resolution which contained various elements which I'll speak to shortly, which is the beginning of a promise that the city may become party to developing a remedy which it will not only live with but which will -- but it will work hard to see implemented with the least possible delay and the least possible reproach.

As a test of the effectiveness of my work with community people and with council people yesterday, your Honor, this resolution was put before the rules committee, which is the body that sets the agenda for next week's council meeting. I believe that the resolution was put on the agenda with a vote of four out of five in favor of putting it on with one abstention. I think it is a measure, at least initially, of some council members' acceptance.

The resolution, your Honor, essentially starts by speaking very strongly about the city's innocence and right to further pursue all appeals, and it then goes on to say that it wil

THE COURT: Is there a text of that resolution?

MR. NEWMAN: Yes, your Honor, it is right here (handing to the Court).

THE COURT: Thank you.

MR. NEWMAN: And it then goes on to outline on the second page, your Honor, what it will actually do, which is essentially: that it will pursue the location of the 200 units throughout Yonkers; that it will try to put a few number of units there; that it will work with citizen groups as advisers to locating the specific sites; that it will work expeditiously to have the sites turned over for the purpose of housing; that it will obviously change the zoning; that it will work expeditiously to prepare the requests for proposals in a competent, professionally competent fashion; that it will then issue these and have them returned and reviewed and prepare contracts with the developer for the commencement of construction.

However, one very important point that they hold in reserve is that they do not want to see construction commence until they have exhausted all their appeals.

The question rises as to how long it will take to exhaust the appeals and how much longer that is in fact than the whole process of getting to the point of construction. Go getting to the point of construction would probably take between nine to twelve months, for all the sites together, pursuing this expeditiously.

The question then is: need all of the appeals up to the Supreme Court be exhauted?

I don't see myself that this is a negotiating point with the city, because the sentiment expressed by every homeowners association group was always, we don't want to see construction commence until we've exhausted our appeals, even though they know full well, all of them, that the chance of the success of those appeals are minimal. This is the sentiment that prevails. And I think this is why the city in its resolution made that such a strong point.

They also put in this resolution another point: That over and above the 200 units of public housing, they would like to see a limit placed of 200 units, and no more, for the use of the

housing trust fund money which the Court had asked me to explore whether it was 200, 400, 600, 800, etc. This is the second request that they put in there.

In summary, my feeling, your Honor, is that -- and I don't think I'm being optimistic or naive or perhaps overly naive -- that an awful lot was accomplished in the past few weeks primarily because the issuance of the requests for proposals for School 4 and Whitman will be taking place very shortly. This has been very sobering to the communities and I think at last they come to grips with the fact that they must themselves do something to participate in the developing of the remedy and in accepting it and in seeing it implemented in an acceptable and perhaps civilized fashion.

I think there is a lot of progress there in winning over the council people and the community. I would hate to see it go by the boards.

On the other hand, I think, now speaking for the Court with my court hat on, that the Court must be leery that this is not still a further elaborate delaying process. I think safeguards must be put in. Marks along the road of progress, bench points or benchmarks, if you will, should be set up for achieving each one of the necessary steps to making these sites available. We should set up a time limit for the transfer of the land for these other sites, a time limit for the zoning, a time limit for setting up of the requests for proposals of each site, the issuance of the proosals, a review of them, final contract negotiation and signing of the contract, so that nowhere along the line is there an impediment. And should there be impediments, then we have the recourse of going back to the immediate issuance of the request for proposals for Whitman and School 4.

That, essentially, your Honor, is our report to date.

THE COURT: Well, I have many questions.

I take it that the predicate for this is the identification of available sites in Yonkers not previously identified or not previously proposed by Yonkers or by any other parties.

Am I correct in that?

MR. NEWMAN: That's correct. I have today shown most of those sites to Sarah Vanderwicken the Justice Department so that we can have at least someone here from plaintiff's side who could speak even to the possible acceptance of these sites.

On Monday, this coming Monday, I am scheduled to make a tour of the sites with the NAACP people and their attorney.

THE COURT: And is there any reason why you can't identify those sites more specifically?

MR. NEWMAN: I'm sorry. I didn't realize that. The sites are here and they can be identified either on a map and there are photographs of each site accompanying them.

THE COURT: And how does it come to pass, if you know, that despite all the previous scrutiny and analysis of Yonkers going back over many years and all the information that was furnished or claims that were made as to the unavailability of land that you have now located these sites?

MR. NEWMAN: I would probably say that it is due in no small part to my genius. But that aside, it was a technique that I think I used that the others did not employ, which is to use large-scale aerial photographs to first find the property, to then identify the property which many may have taken as being park land and then finding out that in fact this was land which 25 years ago was assigned by the county to the city and accepted by the city as park but not converted by the city to dedicated park land. That means that the city can now, through a simple act between its council and the county board request a conversion of this land to muncipal use rather than park use. It would then be available for housing. Additional funds would

have to be paid for the land because only a dollar was paid before, but those funds would be in keeping with the intended use and would not be so high as to prevent it from being used for public housing.

THE COURT: Is this land currently being used as park land?

MR. NEWMAN: No.

This land is currently bare scrub for the most part, that is to say, roughly an area where people are not using it at all or parking automobiles illegally or dumping rubbish.

THE COURT: And this vacant publicly owned land is, in your view --

MR. NEWMAN: Very suitable for housing.

THE COURT: Includes transportation, shopping?

MR. NEWMAN: Most of the sites have that.

THE COURT: Schools?

MR. NEWMAN: It think that Sarah Vanderwicken will be able to verify that for the most part.

THE COURT: Ms. Vanderwicken, have you seen the sites?

MS. VANDERWICKEN: Yes. I've seen some of them, not all of them.

THE COURT: How many separate sites are we talking about?

MS. VANDERWICKEN: There were about eight or nine separate sites, depending on how you -- some of them there were two separate parts of essentially the same area that I saw.

Some of them would in fact I think be questionable in terms of closeness to transportation, and so on. Some of them were very close to transportation and very reasonable sites.

THE COURT: That have just been existing in Yonkers undetected for these purposes for the past 20 or so years? I mean, if that's the case. I mean, I can't resist I grew up in the Bronx. I lived near 161st Street. The street immediately to the south of 161st Street is 155th Street. And whenever anybody new would move into the neighborhood, the question would be asked, what happened to the intervening streets? And the answer would always be that Jimmy Walker sold them to Boston. It's mindboggling that despite the Cadeub-Fleissig and Pistone and all these other groups that this land has been there.

MR. SUSSMAN: Some of the sites had been previously identified. I think we're getting off a little bit on a tangent. Some of the sites had previously been identified. I think Henning Park, as I understand it, is a site.

There are sites, as I --

MS. VANDERWICKEN: Yes. One of them is in the Pistone list. There is some land on the Lincoln High School site that is on his list.

THE COURT: Yes.

MS. VANDERWICKEN: Your Honor, I think the explanation is that we had actually known that there was some property that the county had given the city for park land, but we had been told in deposition -- and I don't remember whose -- that it was unavailable, essentially; it was, you know, among the park land sites that were unavailable, but this apparently is different.

THE COURT: Obviously there is nothing before me now other than an interim report. There is no City Council resolution, it's merely the placing of it on a agenda.

Let me express a concern that I have, and that relates to what you state is a -- I think you used the term "non-negotiable" aspect of this with respect to construction and the appeal.

As the parties, at least those parties who were involved in the school implementation plan know, I have no desire, indeed think it would be improper to impede an appeal. I welcome an appeal. It is one of the reassurances a judge has is that there is an appeallate court.

But I also have -- and Mr. Newman -- some experience with builders and developers. One of the early questions that somebody will have when he is presented with a RFP is how real is the proposal and how quickly and with what degree of assurance can he commit resources, manpower and funds to the particular construction project.

When you say that all of the paperwork would take a period of time, and during that period of time the appellate process might reach its conclusion, it seems to me that that is not perhaps the appropriate perspective. One of the questions will be the willingness of builders to spend the time and the effort in submitting proposals and also the costs. And obviously the more uncertainty that exists with respect to costs and timing, the larger the cushion the builder or the developer has to have.

At some point some historian may wonder about the costs of this case, the total costs of this case.

My concern is twofold:

1. That saying no spade in the ground until the appellate process is exhausted through the Supreme Court of the United States is going to create an untoward delay; and the other concern is the dollars and cents which because of the building into the bid price of sums which the builder would want to compensate him for this additional risk factor.

Ideally, one would say, as the school board in a somewhat comparable situation has said, this is without prejudice to our rights to appeal which we preserve and intend diligently to pursue. But this housing is needed and is in the best interests of Yonkers. And so while we will diligently pursue our appeal, we commit to build some or all of this housing in any event.

I'm confronted with this for the first time, and I'm just wondering what the impact of that would be on costs and also what the impact of that would be on the concern that I'm sure will be heard in this courtroom and in the community that this is simply an effort at delay.

You envision a total of how many sites?

MR. NEWMAN: Approximately eight sites with about 24, 25, 26 units on each site.

THE COURT: So that each site would be solely public housing?

MR. NEWMAN: Yes, in that instance.

THE COURT: And what would the impact of this be on Whitman and School 4?

MR. NEWMAN: Whitman would probably be reduced to about 35 units of public housing and School 4 to about 20 to 24 units.

THE COURT: Would this plan utilize the existing Whitman building?

MR. NEWMAN: In no way, no.

THE COURT: The school board would keep the Whitman building?

MR. NEWMAN: It could in this plan, yes.

THE COURT: And with respect to School 4?

MR. NEWMAN: The existing building would probably have to be torn down.

THE COURT: Mr. Larissa, do you know anything about these sites?

MR.LARISSA: No, your Honor.

THE COURT: Anyone else wish to be heard?

MR. SUSSMAN: Yes, your Honor.

THE COURT: Mr. Sussman.

MR. SUSSMAN: Thank you, your Honor.

Your Honor, I just would like to make a few points. I realize that we're not at this time deciding on an alternative course of conduct since, as you've pointed out, nothing is yet before the Court. But in light of

Portions of Minutes of District Court Proceedings
(Sand, J., April 21, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH, NAACP,

Plaintiff-Intervenor,

v. 80 Civ. 6761 LBS

CITY OF YONKERS, YONKERS BOARD OF EDUCATION,

v.

SAMUEL R. PIERCE, JR., Secretary, U.S. Department of H.U.D., et al.,

Defendants.

----------X

April 21, 1987
2:00 p.m.

Before:

HON. LEONRAD B. SAND,

District Judge

APPEARANCES

SARAH VANDERWICKEN,
LINDA THOME,
Attorneys, Department of Justice

MORTON SUSSMAN,
Attorneys for Plaintiff-Intervenor

BUTZEL, LONG, GUST, KLEIN & VAN ZILE
Attorneys for Yonkers Board of Education

JOHN H. DUDLEY,
of Counsel

VEDDER, PRICE, KAUFMAN, KAMHOLZ & DAY
Attorneys for the City of Yonkers

MICHAEL SCULNICK,

-and-

JAY HASHMALL
Corporation Counsel for the City of Yonkers

RAYMOND M. LARIZZA,
CARL TIBBETTS,
Attorney for U.S. Department of HUD

SEWARD & KISSEL
Attorneys for Crestwood Civic Association

ALBERT A. WALSH,
of Counsel

(In open court)

THE COURT: This hearing is being held pursuant to this court's order to show cause dated April 13, which I entered after having received the interim report of the outside housing

advisor, Oscar Newman, on April 9. By the request of the parties and with the agreement of the court, the hearing was adjourned from yesterday until today.

The Court has been advised that the City Council of Yonkers last week adopted a resolution and I think we should mark as an exhibit the exact text of that resolution. There were other copies that were being distributed which I understand were not the final version.

Mr. Sculnick, are you handing up now the final version as passed by the Civil Council?

MR. SCULNICK: Not only the final. It is certified as true and correct by the City Clerk.

THE COURT: We will mark that as Court Exhibit B.

(Court Exhibit B was marked for idenification)

THE COURT: In light of this resolution, Mr. Sculnick, does the City of Yonkers have any application?

MR. SCULNICK: Your Honor, the city does not have an application at this time. It is currently examining the options and the prior suggestions of the court in terms of how that application should be made, and also in view of the pendency of this hearing, the city didn't know whether it was appropriate to make such an application, but indeed will be making such an application as soon as practicable.

THE COURT: But it is the present intent of the City of Yonkers to move to modify the previous housing resolution?

MR. SCULNICK: Yes. In accordance with the city housing resolution as adopted and marked as Court's Exhibit B.

THE COURT: All right. It was agreed at a conference held last week that the hearing would go forward today, but that we

would attempt to conclude the hearing, nor go beyond the eliciting of the direct testimony of Mr. Newman and whatever other matter the parties wish to relate. But the court recognizes that counsel have indicated that they have had an insufficient time to investigate some of the matters and that things are still somewhat in a flux. So we will proceed then.

Mr. Newman, suppose you take the stand.

OSCAR NEWMAN, having been duly sworn, testified as follows:

THE COURT: Mr. Newman, essentially, what we would like from you is a second interim report. But I think it would be helpful, before you got to the present status of your inquiries, if you would recount for us what has occurred since your appointment by a court order of February 13, 1987. What have you been doing since that time?

THE WITNESS: I was charged to do two things essentially. One was to find an additional site for additional 40 units of public housing, and then to develop conceptually a program for using the two and a half million plus funds set aside from the community development block grant as a housing trust fund to find ways to produce low to moderate-income housing using a variety of different mechanisms and to pursue that with some specificity with possible developers.

I began by looking at possible sites, trying to find possible sites for additional 40 units of public housing. Within that time frame, I was asked by plaintiffs if I would not also take a look at the Whitman School site. I was able, using a variety of different mechanisms different from ones employed by my predecessors, to find some additional sites for public housing.

THE COURT: If I may interrupt you for a moment. In the course of your inquirires and investigations, did you consult with city officials to ascertain what had been done previously and what the state of knowledge was with respect to available land in Yonkers?

THE WITNESS: Yes. I spoke with all parties in the city who had tried to find such sites. I spoke with the city's consultants employed by plaintiffs. And I looked at the sites proposed by the engineer hired by the Crestwood Lake community and surroundings. In other words, everyone who at any time--I also looked at the sites assembled many years ago by an engineering firm for the purpose of finding urban renewal siters or public housing sites.

THE COURT: At the outset of your inquiries and investigations, did you receive the full cooperation of the people?

THE WITNESS: At all times, everyone was cooperative, although I did feel that some people were not as forthcoming as they might be, particularly in other agencies like the county, New York State Department of Transportation, and so on. At that point I asked the court if it would not write a letter to some half dozen individuals I was speaking with asking them to be more forthcoming about possible sites and apprising them of the consequences of their not being so forthcoming, and this was done.

THE COURT: And that was the court's letters of March 13 which we will mark Court Exhibit C.

(Court's Exhibit C was marked for indentification)

THE COURT: And thereafter?

THE WITNESS: Thereafter, sites that I had managed to indentify from large-scale aerial photographs subsequent to a helicopter review of the City of Yonkers, I was able to get provided to me very specific information about the sites so identified, particularly from the county, Westchester County, who some 25 years ago had assigned some eight large pieces of land to the city for the use of the park and which had been designated as park but not dedicated as park as we now understand. We are still pursuing this, but there is a resolution by the City Council dating back almost 20 years designating

the county-assigned land as park, but there is no resolution yet found dedicating it as park.

In pursuing with the county the process of reassigning the land and from park to municipal use, the procedure outlined by the county and confirmed by the city is that the city simply has to, through counsel, ask the county to reassign its municipal use and the county board then confirms that and essentially it can be used for municipal use, public housing being such a use.

In reviewing the Whitman site, I found many problems with both the site and the request for proposals.

THE COURT: Before you get to that, you told us on April 9 that you had reached the opinion, tentative opinion at that time, that there were available in East Yonkers several sites of publicly-owned from the standpoint of the purposes of the housing remedy order and HUD criteria, and otherwise, for the construction of 200 units of public housing.

THE COURT: Suppose you continue.

THE WITNESS: In reviewing the Whitman request for proposals and the site, I developed a series of misgivings, first about the property and secondly about the request for proposals as issued. I can, if you --

THE COURT: I think what I would rather do, rather than the negatives of the Whitman and RFP, which we will come to, as of this moment can you indentify sites in East Yonkers which you believe meet the requisite criteria and which--well, I will end it there.

THE WITNESS: Yes. I have here a map, a copy of which at a smaller scale I gave to both the City of Yonkers and to plaintiffs Friday of last week.

THE COURT: Does that differ from the map that was marked as a court exhibit on April 9?

THE WITNESS: Yes, it does. The map I gave you then was a working map which included all the sites that I had been looking at or part of all the sites that I had been looking at, and it was simply entered as an exhibit.

This map reduces the number of those sites to eight sites in total and this map also has on it the location of shopping facilities, the location of schools, and the location of bus routes.

THE COURT: All right. We will deem that marked Court Exhibit D. Suppose you just take us through that map and identify the sites, and if you have got photographs of the particular sites or anything else that would help us identify them, that would be useful.

THE WITNESS: I think my photographs are over there.

THE COURT: Do you want to set up that chart holder.

(Pause)

THE COURT: You say eight sites in total. Does that include School 4 and the Whitman?

THE WITNESS: Yes.

THE COURT: So there are six additional sites?

THE WITNESS: That's correct. Yes. I will use the map and then refer to the photographs. There are eight sites found. The first site is at the base of the Hillview Reservoir. It's a comparatively--it's a flat site which faces on two sides single-family residential homes. It's on a bus route, Kimball Avenue. It is a short walk in two directions, about three to four-tenths of a mile or less to two shopping streets. One is McClean Avenue and the other is

Yonkers Avenue. And there is some shopping on Kimball.

The second site --

THE COURT: Do you have a photograph of the first site?

THE WITNESS: Yes. This is a photograph of the first site taken from within the Reservoir property on the road that does here and looking in this direction, which is to day looking east toward Kimball Avenue and Shipman.

THE COURT: We will mark that photographs E.

(Court's Exhibit E was marked for identification)

THE WITNESS: The second site is a portion of the Lincoln High School which faces onto two streets, Midland and Theresa Avenues. Lincoln High School site is a rather large site, shown as a big, open space on the map. The school itself is located fronting Kneeland. Kneeland is about 40 to 50 feet above Midland. The site is a plateau here and then falls steeply and there is a flat area bordering Midland. So even though this is a portion of Lincoln High School, it is an area that has never been used for any school purposes and is unlikely to ever be used by the school to any purpose given the separation in distance and more significant separation in height. In other words, there is a plateau, a steep fall, and when the site we are talking about is down here bordering Midland. The school us up here on a plateau.

THE COURT: Are you raising your hand?

MR. SUSSMAN: Yes. I would like to know, if we can, as we go along what the size of these sites are.

THE COURT: I thought we would do that and go back to the sites and the proposed developments.

MR. SUSSMAN: All right.

THE COURT: That is presently owned by the School Board?

THE WITNESS: It is presently owned by the School Board and looking into the legal structure of that as faces this court, the land was designated by the city to the School Board for use as a school. Such lands are usually held by the city and designated to the school for a particular use. When the school does not use it, it returns to the city, reverts to the city. The procedure for attaining this land would be tha the School Board pass a resolution that it does not need this land and then the city could simply accept it.

The procedure for attaining this portion of land is more complex because it belongs to New York City and it would require a resolution by the Water Board of the city that it did not need this particular parcel. This particular parcel is clear and distinctly separated from the Reservoir and from the road and is not being used for any purpose now.

THE COURT: Let me have that again. That is the Bellevue Reservoir site?

THE WITNESS: Hillview.

THE COURT: That requires a resolution by which?

THE WITNESS: The Water Board.

THE COURT: Of the City of Yonkers?

THE WITNESS: City of New York. The board is the Water Board, but the operating agency is the New York City Department of Environmental Protection. Procedurally, the Department of Environmental Protection would have to make the determination that this piece of land is not necessary to the functioning of the Reservoir and could be disposed of. The board would then have to make that disposal. It is possible through eminent domain procedures, it might be possible under

a public housing authority for the City of Yonkers to acquire that land should it so desire. There are powers the City of Yonkers, as any municipality, has in this area.

THE COURT: The photograph you have in your hand is of what site?

THE WITNESS: The photograph I have in my hand is of the Lincoln High School site and it is taken looking south and down Theresa Avenue. The site appears to the left.

THE COURT: The Lincoln High School site will be Exhibit F.

(Court's Exhibit F was marked for identification)

THE COURT: Maybe Mr. Sussman's idea is a good one since there going to be eight of these.

Coming back to the Hillview Reservoir, do you know what is the total acreage?

THE WITNESS: I have not measured it to that purpose. But I would estimate it is between four and five acres.

THE COURT: In your opinion, what would be an appropriate utilization of that site for these purposes?

THE WITNESS: I have some notes I would like to refer to.

Twenty-four units of semi-detached housing would fit comfortably on the Hillview Reservoir site. For the Lincoln High School site, which is probably three to four acres, three to five acres, 26 units of semi-detached housing, a unit being a family house or a family apartment.

By semi-detached housing, I mean housing which consists of two single-family houses side by side sharing a common wall, each family having its own separate entry and each unit

being two stories in height. I submit here a photograph of a semi detached public housing unit constructed by the City of Charlottesville, Virginia, as public housing.

THE COURT: We will mark that as G.

(Court's Exhibit G was marked for identification)

THE COURT: Do you have a sketch or a projection of how these sites would be developed?

THE WITNESS: Yes, I do. Since most of the houses on the sites border on existing streets, it is my intention that the semi-detached houses be arranged on a street very much like the single-family housing opposite, to be virtually indistinguishable from them in look and character. I have made an illustration here on one of the sites showing how the semi detached houses would look and the resulting character of the street. These have been provided to plaintiffs, as well as the City of Yonkers.

THE COURT: We will mark that H.

(Court's Exhibit H was marked for identification)

THE COURT: A xerox copy may be substituted for the original.

(Pause)

THE WITNESS: The next site identified was a site on Rumsey Avenue at the tail end of a large park called Redmond Park. It is separated from Redmond Park by roughly-wooded areas and a small natural lake and is not used to any purpose currently except for excess parking and other storage by the residents across the street, essentially in an illegal fashion. This is part of the parks that I was able to identify, the part of the excess land given by the county to the city 25 years ago.

Part of the site belongs to the City of Yonkers currently and another part of the site belongs to New York City as part of its pumping station. Both parts are unused. It is not necessary for us to have the New York City portion to develop the site to our purposes, although this would allow us to put more units on it.

If we just use the part that was owned by the City of Yonkers, we would be able on that site to place 16 untis of housing. If we could attain a part of the City portion, we could easily put another 8 to 10 units on the site.

The two parts are easily differentiated becaused the part that belongs to the City of Yonkders has a shaded gray tone on it, whereas the part that belongs to the City is white. I will give you a photograph of that site. The site is about two and a half acres belonging to the City of Yonkers and another two and a half acres belonging to New York City. This is a photograph of that site.

THE COURT: That is Exhibit I.

(Court's Exhibit I was marked for identification)

MS. VANDERWICKEN: Could I ask if Mr. Newman could tell us when he is describing the acreage whether or not that is the acreage of the entire plot that is undeveloped or the part that would project as being used for this purpose as public housing in each instance.

THE WITNESS: It is the part that I would be seeing used to our purposes, rather than the part that is undeveloped. That is true for all three sites I have talked to to date, the Hillview Reservoir site, the Linocln High School site, and the Redmond Park site.

THE COURT: You are saying those are not the totality of the sites, but only the portion that you would utilize?

THE WITNESS: That's right.

THE COURT: Would you, not necessarily now, but would you at some point furnish the total acreage of undevloped land contiguous to the portions of the land that you would propose to use?

THE WITNESS: I would be pleased to do that.

The next site we could call Kardash Park. This is another site that was assigned some 25 years ago by the county to the city and the portion that we plan to use is about three to four acres. It borders on Saw Mill River Road, close to Odell Avenue. It is on a bus route and is two-tenths of a mile away from a major shopping -- or let me say a medium-size shopping center.

This is a photograph of the lands we are talking about.

THE COURT: Exhibit J.

(Court's Exhibit J was marked for identification)

THE WITNESS: The next piece of land is a piece of land located on the east side of Yonkers, close to the northern end of the city. It is on land which we will call O'Moore Park and this is a large piece of acreage, a portion only of which would use. The portion we hope to use is about four to five acres.

This, again, is land which the county 25 years ago had assigned to the City of Yonkers for the use of park and I have here a photograph of the lands we plan to use.

THE COURT: K.

(Court's Exhibit K was marked for identification)

MR. SUSSMAN: How many units on Kardash and O'Moore?

THE WITNESS: 20 unit on Kardash and 30 units on O'Moore.

The remaining two sites -- I am sorry. There is one additional site. Excuse me. Another site found that has just a small amount of acreage is a portion of the site occupied by School Number 30. This site is located on Nevada Place, close to Kimball Avenue, which is a bus route, and diagonally across the main county shopping center. The site is difficult physically, so the number of units that could be comfortably put on it is small. 10 units are seen as being put there.

There are two other sites. These are sites that are familiar to everyone. This is School 4, the site of School 4, and a portion of the site of the Whitman High School. The portion of the site of the Whitman High School that is being considered is the only portion which both myself and the HUD team who visited the site last week thought could easily be developed for housing. This is the portion on the northwest of Whitman School. It is a flat playing field currently and by developing that portion alone we could leave the existing school building intact, we would not have to use the lower field behind the school which is swampy, and we would not have to work on the hilly and rocky and forested site. That is Whitman School.

I have here an aerial photograph of the Whitman School site which shows the entire site in a solid purple line, locates the existing school building in black, and shows the flat, low portion and hilly, forested and rocky area. The entire Whitman site is 18-1/2 acres. The school occupies about five and half acres. The building itself, the flat portion occupies about two and a half acres, and the rest is divided approximately equally between the flat, high are and the hilly and forested rocky area.

It is my proposal to develop only the flat, high area which lends itself most readily and easily to development and number of untis that we are porposing to put on that portion would be about 40 units, 40 to 48 units we will say.

If you wold like, you can make this aerial photograph as an exhibit.

THE COURT: L.

(Court's Exhibit L was marked for identification)

THE WITNESS: Regarding School 4, School 4 is a complicated situation. You have an existing building on there which was a school I think up to about 10 years ago that has been boarded up since. It is a turn-of-the-century building which is quite old and suffering wear. It was proposed that 60 units in a walk-up form be put on that site.

The HUD team and myself when we looked at the site came to the same identical conclusions: One, that it would be hard to put 60 units, very difficult indeed to put 60 units on the site even if you tore down the building; and it would have to use the park across the street for parking and that is one of the few parks in the area. It is a true urban park, but it is very intensively used for baseball.

If the building were not torn down but rehabilitated, it could house some 26 to 30 units comparatively easily. The difficulty is rehabilitation costs. No one to my knowledge has been in the building and no one has looked at any existing plans. Based on my experience in rehablitating such schools for housing, if the existing heating system is old, if the electrical system is old, if the heat distribution lines are old, if the roof is old, if the windows have to be replaced by double-pain windows as I can attest they will have to be, the cost for rehabbing it could go up to 100 dollars a square foot and HUD's allowed costs for housing is about 68 to 70 dollars a foot. We will go into that. So that rehabilitation may not be possible given those costs.

If the building were torn down, it could take about 20 units of semi-detached housing on it and still keep the park across the way.

In speaking to some of the more vocal and intransigent residents of the community subsequent to the hearing and resolution on the future of that school, I reassured them when they raised the question about its historic character and the need to preserve it that we could rehahiblitate if and keep the facade as required by the state, and would only put about 26 units. Their reply, after first stronly advocating its preservation for historic character, was "Well, if you are going to just put 20 units in it, you might as well tear it down." I must admit is came somewhat as a surprise given that the space between the first advocacy for historic preservation and the decision to tear it down was less than a minute.

So we have possibly two options there on the reuse of the school for site.

Those essentially are the eight sites. if the eight sites, or even if a portion of them were found, but if the eight sites were found to be suitable, we would be able to take the 200 units of public housing and distribute them more equally so that no particular site got more than 40 to 45 units. It is my hope to try to find a few more possible sites for public housing to gain a more even distribution of all the sites throughout the city.

As one can see just be looking at the map, there is an area between the Cross County Parkway and the Whitman School on the east side which is devoid of any sites and in working with the community and with the Yonkers Council people, there was an expressed desire that the public housing be distributed equally throughout the city and on small sites.

If you would like, I will not talk about my tour of these sites with HUD and subsequent conversations.

THE COURT: I have some questions that may be relevant to that. When you are talking about the greater dispersal of the sites, I take it that that is for purposes of community support and political acceptance, not for planning or other reasons?

THE WITNESS: Correct.

THE COURT: In terms of the objectives of the housing remedy order and the impact on the community, the desired impact on the community, are these units of density in your opinion appropriate, as small as 10 units? In other words, you neither want to overly impact an area, nor do you want to make the residents resistant to the area on the grounds of isolation. Are you satisfied that these would be appropriate?

THE WITNESS: Only the School 30 site with 10 units is worrisome in that respect.

THE COURT: That is the site I had in mind for that reason.

THE WITNESS: I think your insights are quite correct. Not only do we want to have a large public housing project, but on the other hand we do not want to have a project so small that the public housing residents who are a minority feel particularly vulnerable or isolated. Although I have to tell you that Charlottesville Virginia housing projects, where the City of Charlottesville some 15 to 20 years ago decided to embark systematically on a scattered-site program, does have very small projects of about 10 to 16 units set in identical setting of a middle and upper-middle-class white, and the size of the project, the smaller ones, did not seem to bother the residents and are quite successfuly, are very successful. So that concern may be one which we may share more than the actual residents would share over time.

THE COURT: You want to talk about your visit with HUD?

THE WITNESS: Yes. At your Honor's request and through the provisions set up by Jim Baugh's office, we were able to get four people from HUD to come and look at these eight sites on April 15. Those four people are Alfredo Fredericks, who is a construction analyst; James Taylor, who is the chief appraiser from the HUD regional officer here in New York -- all of these are from the HUD regional office in

New York -- John Brendal, who is the landscape architect; and Douglas Manley, who is the enviornmental clearance officer. Marty Sckalor, who is the regional office direction for development, set up that meeting but was not himself able to make the trip.

We reviewd the sites and actually two additional sites. I am sorry. I stand corrected. One additional site. That one additional site was rejected by the HUD people as being too small. It was the site bordering Welty Park on Brynmawr Terrace.

THE COURT: That is the Henning Park site?

THE WITNESS: No. That is still a different one. This is Welty Park.

THE COURT: I asked because I received a letter saying that you discussed a site located in Henning Park on

Yonkers City Council Resolution, Exhibit "C" to District Court Proceedings (Sand, J., April 21, 1987) *2:05 p.m.* 4/21/87

COURT EXHIBIT
U.S. DIST. COURT
S.D. OF N.Y.

RESOLUTION NO. 69-1987

No. 19 AMENDED

BY MAYOR MARTINELLI AND VICE MAYOR OXMAN:

WHEREAS, the City Council is opposed to the proposed Court ordered construction of three hundred (300) units of housing on the Walt Whitman Junior High School site (100 public housing units) and the construction of sixty (60) units of public housing on the School 4 site; and

WHEREAS, the proposed requests for proposals (RFP's) to construct these housing projects at the School 4 and Walt Whitman sites are soon to be sent out; and

WHEREAS, the City continues to oppose the findings and conclusions of the Court in its several opinions and orders and reaffirms its commitment to appeal these orders all the way to the Supreme Court of the United States, if necessary; and

WHEREAS, in the event all of the City's appeals are unsuccessful, the City Council must save Yonkers from the disastrous effect the proposed large concentrations of public housing projects at the Walt Whitman and School 4 sites would have not only on those neighborhoods but on the entire east side of Yonkers which would likely create new ghettos; and

WHEREAS, the Court appointed Housing Advisor, Oscar Newman, has proposed an alternative remedy plan in the event the City's appeal is unsuccessful, which plan rather than concentrating a large number of units at two sites spreads the two hundred units in much smaller numbers throughout as

many additional locations in east and northwest Yonkers as necessary or desirable pursuant to the Court Order; and

WHEREAS, the City Council's primary responsibility in the event the City's appeal is unsuccessful is to protect and preserve Yonkers from the harmful effects of unduly large public housing developments, and to prevent the occurrence of re-segregation.

NOW, THEREFORE, BE IT RESOLVED, that the City Council reserves all of its rights on the appeal in the matter entitled *United States of America v. City of Yonkers* and reaffirms its commitment to appeal the finding of liability and the housing remedy order and all other orders to date all the way to the Supreme Court of the United States.

BE IT FURTHER RESOLVED, that the City Council agrees that it is completely opposed to the construction of public housing developments of the kind and extent currently proposed for the Walt Whitman and School 4 sites as it is unalterably opposed to the Court Order which requires the construction of public housing units in specific areas of Yonkers.

BE IT FURTHER RESOLVED, that the City Council expresses its support for REDUCING the size of the proposed units of public housing on the Whitman and School 4 sites to not more than thirty five (35) units at the Whitman site and thirty (30) units at the School 4 site and to support the Housing Advisor's plan which has not as yet identified all likely sites to locate anywhere from six (6) to as many additional sites as necessary or desirable to locate the remaining one hundred and thirty five (135) units of public housing dispersed equally among all wards in east and northwest Yonkers according to the Court Order in order to minimize the effect on each community individually and the City as a whole and expresses its commitment to provide all necessary support for the timely construction of these units provided the following conditions are met;

1. The City reserves its rights to appeal all orders of the Court to the Supreme Court of the United States.

2. The Housing Advisor shall set up a working site selection committee from each affected ward to advise on the final selection from the approved sites.

3. The City will work cooperatively and expeditiously in preparing professionally competent requests for proposals (RFP's) for all sites, will issue these RFP's in a timely fashion, will share with all parties the proposals submitted, and will work with the selected developers in expeditiously preparing and executing contracts to expedite the construction of the housing subject to suoparagraph 4 below.

4. No actual construction commences prior to the exhaustion of the City's appeals.

5. These 200 units of public housing are the limit for the construction of public housing in the east and northwest sections of the City of Yonkers.

6. Not more than an additional 200 units of affordable housing be made available pursuant to the Court Order using Housing Trust Fund moneys with not more than 100 of these being newly constructed and the remaining units to be placed in already existing buildings but not more than 2% such units in any one building, placed in apartment buildings in the process of converting to cooperative or condominium, or rental units.

7. All families or individuals applying to reside in the public housing constructed pursuant to this Resolution and the Court Order shall first be screened by a Local REsidents Advisory Committee which shall be established by MHA and function in accordance with the appropriate HUD regulations and guidelines (24 C.F.R. Section 960.206) which Committee shall screen all prospective tenants.

8. The City agrees that simultaneously with the selection of specific sites it will dedicate and construct additional park

and recreation areas on or near each site where appropriate, funds permitting. It is the City's intention not to construct additional housing, public, affordable, or otherwise at or near any specific site selected and to provide additional park and recreational land for the residents of Yonkers.

9. In the event the City is successful on its appeal this Resolution has no further effect.

11001

Adopted by the City Council at a stated meeting held on April 15, 1987, by a vote of 9 to 4, Minority Leader Longo, Councilmembers McKirgan, Spallone and Fagan, voting "NAY."

This is to certify that the foregoing is a true and correct copy of the record on file with the City Clerk, City of Yonkers, N. Y.

/s/ Aloysius Moczyolowski
CITY CLERK
Yonkers, New York

Motion by City of Yonkers to Modify Housing Remedy Order, Dated May 8, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

80 CIV. 6761 (LBS)

-and-

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

NOTICE OF MOTION FOR ORDER MODIFYING HOUSING REMEDY ORDER

----------X

PLEASE TAKE NOTICE that defendant City of Yonkers, upon the testimony of the Outside Housing Advisor adduced at the hearing of this motion, and upon the prior proceedings had heretofore, will move this Court on May 12, 1987, at 4:30 p. m., or as soon thereafter as the Court shall permit, for an order in the form annexed hereto modifying the Housing Remedy

Order, entered May 28, 1986, as amended, based upon Resolution 69-1987 of the City Counsel.

Dated: May 8, 1987
New York, New York

Respectfully submitted,

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By:_____
Michael W. Sculnick

Attorneys for Defendant
City of Yonkers

1 Dag Hammarskjold plaza
New York, New York 10017
(212) 223-1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

80 CIV. 6761 (LBS)

PROPOSED ORDER MODIFYING HOUSING REMEDY ORDER

Pursuant to the motion of the City of Yonkers filed May 7, 1987, and upon the evidence adduced at the hearings held April 21 and May 12, 198[illegible] and after hearing the arguments of all parties, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Part IV of the Housing Remedy Order entered by this Court on May 28, 1986, as amended, is hereby further amended as follows:

a. In accordance with Resolution No. 69-1987 of the Yonkers City Council, adopted April 15, 1987, the Outside Housing Advisor (OHA) shall immediately establish working site selection committees of local residents, community leaders

and elected officials from each affected ward of the City to advise him on the selection of sites.

b. After consultation with the site selection committees, the OHA shall identify as many locations as are necessary and desireable to situate 200 public housing units dispersed equally throughout the areas previously designated by the Court. Walt Whitman and School 4, previously designated by the Court for public housing development, may be included in the list of sites so designated, for not more than thirty five (35) and thirty (30) units, respectively. All sites are to be developed with a semi-detached style housing, unless rehabilitation of existing structures is involved.

c. Upon the identification of such sites by the OHA, the OHA shall notify the Court and all parties of the sites identified, and work with HUD to gain their expeditious review and preliminary approval. The Court shall entertain objections from any party to any site during this period of time.

d. As a result of the process outlined above, the OHA shall meet with the site selection committees in order to make final site selections from among those sites that are preliminarily approved by HUD.

d. Upon the designation of such sites by the OHA, the City shall work cooperatively and expeditiously, in accordance with the annexed schedule of events established by the OHA, with the MHA, HUD and all parties to develop the 200 units of public housing, subject to the limitations set forth in paragraph 2 of this Order. The City's cooperation shall include taking such legislative and administrative actions as are within its power to assist in the acquisition and development of the sites.

2. Based upon the City's representations to this Court that it shall expeditiously prosecute its appeal to the Supreme Court of the United States, if necessary, and based upon the OHA's current estimates that the awarding of construction contracts for the public housing units cannot commence sooner than

fourteen (14) months from the date of this Order in any event, and that up to an additional twelve (12) months thereafter will elapse prior to the commencement of construction, or the Court finds that the granting of the City's request for a stay of construction pending the completion of its appeals herein will not result in any significant delay in the development of the public housing. It is, therefore, further ORDERED that no actual construction of any of the units of public housing will commence pending the exhaustion of the City's right to appeal any decision of the United States Court of Appeals for the Second Circuit in the appeal now pending from the original remedial order entered herein (Docket No. 86-6136).

3. Part VI of the Housing Remedy Order is hereby amended to provide that the City shall not be required to assist in the development of more than 200 units of affordable housing assisted with funds from the Affordable Housing Trust Fund, of which 100 units shall be in existing buildings as set forth in ¶6 of Resolution 69-1987.

4. Part VII of the Housing Remedy Order is hereby amended to add the following provisions: "The MHA shall establish Tenant Advisory Committees as authorized by HUD regulation (24 C.F.R. §960.206) to screen prospective tenants in accordance with criteria permissible under HUD regulations, and in accordance therewith."

5. Part VIII of the Housing Remedy Order is hereby amended to add the following: "Notwithstanding the foregoing, the City shall not be required to apply for additional units of public housing, if available from HUD, beyond the 200 units provided for in this and previous orders of the Court; nor shall HUD be required to provide funding to Yonkers for additional units of public housing beyond the 200 units provided for in this and previous orders of the Court."

SO ORDERED.

Dated: New York, New York
May 8, 1987

U.S.D.J.

Institute for Community Design Analysis
66 Clover Drive, Great Neck, N. Y. 11021 (516) 773-4727

SCHEDULE FOR IMPLEMENTING THE 200 UNITS OF PUBLIC HOUSING

Some components of this set of tasks may be pursued simultaneously (to insure expediency), others can only be pursued in sequence. The table below identifies the components of each task and their dependence upon, or independence of, other tasks. It results in a timetable for realizing the housing remedy order. See summary flow chart at conclusion.

Time Needed and Date Task Completed		Task
1 mo.	1.	Identify All Possible Sites for Public Housing Units
1987	a)	Identify further sites, particularly in neighborhoods currently excluded
Jun 1	b)	Have new sites reviewed by NAACP and Justice Department
2 mo.	2.	Obtain HUD Pre-approval of All Potential Sites, Bldg. Type, & Costs
	a)	Obtain HUD pre-approval of housing type and site planning concepts
	b)	Obtain HUD pre-approval of all sites identified for public housing
Aug. 1	c)	Obtain HUD decision on allowed costs and overruns

4 mo.	3.	Obtain Community Input on Selection of Sites
	a)	Solicit representatives from each of the communities to be affected
	b)	Seek representatives' guidance for best locations within their community
	c)	Consult with entire group of community representatives to ensure fair and even distribution of sites throughout designated areas of Yonkers.
Sep 1	a)	Notify every community of intended sites through published notice
3 mo.	4.	Council Resolutions Acquiring and Rezoning Sites
	a)	Obtain control of each site through City Council resolutions redesignating, reassigning, or otherwise acquiring site.
Dec 1	b)	Obtain all necessary zoning changes through City Council resolutions
4 mo.	5.	Prepare Requests for Proposals for Final Sites and Issue R.F.P.
	a)	Obtain boundary and topographic surveys and sample borings for each site
	b)	Determine sewer, water, power provisions and locations for each site
	c)	Prepare schematic site plans, dwelling unit plans, and perspectives for each site as a guide to developers

	d)	Prepare schedule for: review of developers' proposals, contract negotiation and award, construction document preparation and approval, and construction schedule and reimbursement
	e)	Prepare cost data guidelines for developers
	f)	Prepare "boiler plate" for RFP's
1988	g)	Obtain approval of sites from Health, Fire, Environment, Etc. Depts.
Feb. 1	h)	Issue Requests for Proposals
5 mo.	6.	Review Responses by Developers and Choose Winning Submittal
	a)	Await responses from developers (3 mo.)
Jul 1	b)	Evaluate proposals by developers and choose winning submittal (2 mo.)
12 mo.	7.	Developer Prepares Plans and Obtains Approvals
	a)	Developer prepares detailed building and site plans and specifications
1989 Jul 1	b)	Developer obtains all needed permits from Building, Health, Fire, Environment, Etc. Departments
	8.	Construction Commences on First 30 Units (subject to request for stay)
Jul 1	a)	Construction commences on first site

6 mo.	9.	Initiate Tenant Review and Community Support Programs
	a)	Set up community support network to welcome and acclimatize public housing residents
Aug 1	b)	Develop criteria and procedures for Tenant Review Board

Portions of Minutes of District Court Proceedings (Sand, J., May 12, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff, 80 CIV. 6761 (LBS)

-against-

YONKERS BRANCH, NAACP,

Plaintiff,-Intervenor

-against-

CITY OF YONKERS, YONKERS BOARD OF EDUCATION,

-against-

SAMUEL R. PIERCE, JR., Secretary, U.S. Department of HUD, et al.,

Defendants.

----------X

May 12, 1987 3:00 p.m.

(In open court)

THE COURT: Although the primary thrust of this conference relates to housing, I would like the record to reflect that on April 30, 1987, there was submitted to me by Dr. Pastore, the court appointed school monitor, a progress report in which he reported in substance that architectural work on the question of a renovated versus new school 19 is under way and that he anticipated a report from the architects and the board within the month; that similar architectural work on the

Museum School is under way, including consideration of some imaginative alternative to the construction of a new Museum school; that the registration process is progressing smoothly and that a total enrollment in excess of 19,000 students is expected for the fall, which is an increased enrollment over the current year; that in terms of racial balance it is expected that most of the district will be balanced; School 14, 19 and King, however, present problems ranting from serious with regard to School 19, to marginal in scope; and futher stating that his observations are contrary to allegations which have been made by some in the Yonkers community that there is evidence of white flight.

Turning to housing, I think that it would be appropriate, Mr. Newman, if you gave us an updated status report on the matters relating to the sites which you previously tentatively indicated might be available to Yonkers.

MR. NEWMAN: We reviewed the other day eight sites, and there were questions raised by HUD in its memo about the eight sites, specifically in a memo, and some of the criticisms --questions that were raised by HUD in its memo related both to the question of the suitability of the sites and the question of the comparative costs of the proposed semi-detached versus walk-up alternative.

I have in the interim been able to review the HUD memo as well as puruse in some detail the question of the comparative costs of various forms of walk-ups and the proposed semi-detached, pursuing it with actual developers, and was able to look at it in some detail as well the various building codes which govern the construction of various types of housing.

The memos that HUD raised were about the lack of suitability of the sites, to some degree related to the question of distance, to some degree the compatibility of the proposed housing with that of the surrounding community, and to some degree the question of noise factors and the construction suitability of the site.

I have prepared here scale taken off the scale on the map and which every party in this case has been given a copy of this map, so that we can address one of these quesions, each one of these questions at a time. HUD raised the question that some of the sites, in fact, most of the sites were not within two tenths of a mile from shopping. Two tenths of a mile does not appear as an actual figure in HUD regulations, although convenience of access to shopping is a requirement.

However, I would like to demonstrate that foremost of the sites, the question of two tenths of a mile does not really come up. This distance here is a mile as taken from that scale, and if you look at the Hillview Reservoir site, it is exactly three tenths of a mile. Actually, HUD says a quarter of a mile, so we are talking about .05 of a mile difference to the shopping. The question of the Kardash site, it is again exactly three tenths of a mile.

THE COURT: Well, suppose, without going into all the details, you tell me what your opinion is with respect to the suitability of the sites and the appropriateness of these sites under HUD regulations as you understand them.

MR. NEWMAN: I would say that most of the sites -- all of the sites identified really fall well within HUD's regulations, that further, in detailed discussions with developers, the question of increased costs of construction resulting from small sites and many sites was not perceived as a factor, given that each site would have at the minimum ten units, and that the sites were within a few miles of each other on the eastern side of Yonkers. They did not perceive a cost factor resulting from the smallness of the sites or from the fact that there were many sites.

The question -- there are a couple of sites, the O'Moore site and the site at Lincoln High School which are greater than easy walking distance to shopping, that is to say, in excess of half a mile, and that could be a problem. But I checked with the housing authority and found that some 15 percent of existing housing authority reidents have automobiles, which means that

if that same figure applied, 30 units of the total 200 could be expected to have automobiles, making a couple of the sites that have some distance difficulties in fact possible.

THE COURT: Is it a fair summary of your view at the presnt time that further exploration of these sites and the type of housing construction that you described at the last session is appropriate and that you are optimistic that a modificaiton of the housing remedy order to enable construction of the 200 units on these sites would be appropriate?

MR. NEWMAN: Would be appropriate and within the cost guidelines specified by HUD, and furthermore, given some of the restrictive aspects of the building codes, most of the developers I spoke to who prepared actual cost estimates said that they really did not see any difference between the cost of building a two-story walk-up and the cost of building semi-detached units.

A three-story walk-up, if it were not of required fireproof construction, would be less expensive than a semi-detached unit, but the New York State code and the Yonkers code require that three-story walk-ups be of fire proof, that is to say, masonry construciton, which excludes that building type as a contender.

So effectively what we are left with is that we could build at the same cost and within HUD's cost restraints either a semi-detached unit or a two-story walk up at the same cost. The question then would be which would be more preferable, a large concentration of units in a walk-up or the scattered site semi-detached.

The nature of a walk-up, if it were built as HUD suggested in its memo at a minimum of 30 units, would require a larger site than most of these sites are, because, firstly, the size, 30 units, but secondly, a walk-up requires parking in the rear and excess parking than the code allows for private use, so that you would actually have to have a paid parking field at the rear which would require a particularly big site for those 30 units.

That would exclude some of these sites from our consideration. In fact, it would exclude all sites except Whitman and O'Moore Park. Even the Lincoln School site would not be large enough to accommodate 30 units of walk-ups with the required parking according to code.

THE COURT: Now, these sites are sites which include land which was conveyed by the county to the City of Yonkers in 1962 or thereabouts?

MR. NEWMAN: Some of the sites.

THE COURT: Some of the sites?

MR. NEWMAN: Yes.

THE COURT: One of the sites is land on Lincoln School?

MR. NEWMAN: Yes.

THE COURT: Owned by the school board?

MR. NEWMAN: The other site owned by the school board is on the grounds of School No. 30, and the last of the sites is a piece of land owned by the City of New York adjacent to the Hillview Reservoir.

THE COURT: All right. Is there anything else you want to say of a general nature with respect to these sites or with respect to any aspect of this?

MR. NEWMAN: No, only that I am continuing to look for additional sites and will add to the list of these sites once I have had a chance to show these additional sites to the NAACP justice and HUD, in that order.

THE COURT: All right. Mr. Larizza, you don't have to respond at this time to Mr. Newman's comments, although you may if you wish to, but you can be assured that prior to

any actual modification of the housing remedy order HUD would be given ample opportunity to make its views known.

Do you wish to comment at this point?

MR LARIZZA: No, not at this time, your honor.

THE COURT: All right. And Mr. Sculnick, the City of Yonkers has a motion?

MR. SCULNICK: Yes, your honor. The city filed a motion on Friday seeking a modification of the current housing remedy order in conjunction with a request that should the amended remedy order be entered, that a stay of construction also be entered pending the final appellate review process in the case.

Your Honor, the motion is predicated upon the belief that the proposals made by Mr. Newman for low density, scattered site public housing, specifically in a semi-detached form, would achieve several objectives which should be achieved in a remedy order and which the city would support.

These objectives specifically are, first, that the public housing be equally dispersed throughout east Yonkers, the area previously designated by the court as being that area comprehended by the consent decree between HUD and the NAACP; secondly, that the nature and type of public housing develoment can be compatible with the existing neighborhood in terms of density and style; and finally and most importantly, that the public housing develcpment comprehended by the order should attain and obtain the maximum degree of community support feasible.

Though all three of those objectives, we believe, can be attained by what has become known as the Newman plan or the alternative plan, I think also the city makes this motion recognizing that the existing housing remedy order is widely perceived as having negative impact, particularly upon an overbuilding of the two sites now identified, Walt Whitman

and School Four, and because of that overbuilding and the overdensity, it would perpetuate the stigma that has traditionally been associated with public housing and would fail to take advantage of an opportunity to break that stigma and develop a type of housing that could gain community acceptance and provide a better living environment for the people who live there as well as the people who live nearby.

The city believes that the amended remedy order as proposed by the city demonstrates in several instances the city's good faith, particularly because it also anticipates that Whitman and School Four would be used. It should not be perceived as a method or an attempt to derail construction at those two sites. Those two sites have been designated by the court and would be part of a more comprehensive plan and a total package of the 200 units of public housing development.

Rather, the density at those two sites is proposed at a lower level compatible with the densities proposed for all of the other sites. So the city wishes to urge particularly that those facts be recalled in evaluating its motion.

Secondly, it seeks to establish a very specific process by which the remaining sites will be identified. It is not a method or means for further delay; rather, it is a means for eliciting community input in the selection of those sites, but retains the final authority for proposing sites to the court, and, of course, the court making the final decision, but the outside housing advisor will be the individual who has the final authority and control over making designations of the sites subject to court approval.

Now, the city is aware that -- well, let me go back. As part of its motion, the city requests that a stay of actual construction be granted pending the outcome of its appeals, and in its motion it has attached an analysis prepared by the outside housing advisor setting forth the specific tasks which must be accomplished at each stage in the development of the public housing, and then on the last page sets apart or against each other a flow chart of the tasks necessary to implement the

housing remedy order compared with the schedule for processing appeals.

Now, there are three discreet periods of time involved in the schedule for processing of appeals, and the first one is the one that is obviously toughest to anticipate at this point in time.

The motion is predicated upon the assumption, which the city believes is a fairly sound one, that the Second Circuit will issue its decision by the end of the summer, September lst. That will have allowed seven months from the oral argument and--it's an arbitrary choice but one which we felt we had to make to at least demonstrate the time lines. Of course, it could be either shorter or longer than that.

The second phase would be, assuming that the Second Circuit affirms the district court and the city seeks certiorari from the Supreme Court, there is a fairly compact period of time at that point, six months from the issuance of the Second Circuit decision until a decision by the Supreme Court whether to accept or deny certiorari, then if the Supreme Court were to grant certiorari, anywhere from a year to 18 months until the Supreme Court could render its decision.

In view of the schedule set forth by the outside housing advisor, the city submits that the granting of its requested stay would not entail any appreciable delay in the implementation of the public housing development, but rather, that they would dovetail fairly closely, so that the harm to the plaintiffs would be minimized in this situation because there already is built in a period of approximately 18 months to two years prior to the point when construciton can commence.

So the city would submit that the granting of the stay would not result in any undue hardship to the plaintiffs and would allow, rather, an opportunity for all parties to expeditiously pursue all of the tasks that need to be accomplished prior to construction but in an atmosphere which would allow the city to be able to say, okay, if the appeals are not successful, this is what the city proposes as a better remedy

plan, and on that basis, the city requests that the court grant its motion modifying the housing remedy order.

THE COURT: Let me make some comments before I call for an expression of views by the other parties. And some of what I say I recognize is going to be repetitious of comments that I had previously made, but I ask your indulgence to forgive the repetition because I realize that it is important not only that everyone in this room understand the court's views on this matter, but that the community of Yonkers as a whole understand the court's views on this matter.

First, I am entirely in sympathy with the concept that the housing remedy for Yonkers embody to the maximum possible extent consistent with the purposes of the housing remedy order the views of the community itself. This is not a new attitude on my part. It is an attitude reflected very clearly in the housing remedy order of November 1986 when I denied the application of the Department of Justice that the court in the first instance designate sites, but said, rather, that the community of Yonkers through its elected representatives should be given the first opportunity to designate sites, and only if they failed to discharge that responsibility which was primarily theirs, would the court engage in site designation.

MR. SUSSMAN: May 1986, not November, just so the record is clear.

THE COURT: May, thank you.

When the outside housing advisor was in place and the available land was "discovered," the court's view was not then and is not now that it is simply too late. But at the same time, I would be derelict in my responsibility to the class whose constitutional and other rights I found to have been violated by Yonkers if I did not act in a manner which gave assurance that we would not be embarked on a venture, the primary purpose of which was simply to achieve delay.

Now, in several significant respects, the motion by the City of Yonkers is premature. We learned when we were last together and learned again today that many of the sites which area proposed in what is now being referred to as the Newman plan -- I hope, Mr. Newman, an appellation which you in future years view with pride -- are simply not owned by or subject to the control of the City of Yonkers. Indeed, many of the sites were conveyed by the county of Westchester for park purposes, so that there would be, absent action by the county of Westchester, a reversion of the land to the county were it used for any other purpose.

The county of Westchester is not a party before the court and I cannot order or compel it to take any action with respect to this land in the present posture of the case. Other land involved belongs to the school board, which is a party in this litigation. One parcel belongs to the City of New York, not a party in this litigation.

I indicated a willingness to compromise and a willingness to have some reasonable delays provided that there was the assurance furnished to the plaintiffs and to the court that this was a good faith effort to come up with the best possible housing plan which would indeed have a degree of community support which the plan in the present housing remedy order lacks.

I became acutely aware, based on the history of this litigation, based on the statements that have been made by some, that there might be some misconception on the part of interested persons with respect to the degree of finality which would attach to any housing remedy order of this court that modified.

It would simply not be acceptable to permit periods of delay, only to discover that for whatever reason some local governmental approval necesary to implement the plan would not be forthcoming. It would not be appropriate for anyone to envision that the forum for constituent appeals was simply being shifted to some other governmental body.

After giving this matter considerable thought as to how such assurances could be given and how persons could be disabused of any notion that they still retained some veto over implementation of the housing remedy order, I came to the view that there were several specific actions which the Yonkers city council could now take and could request others to take.

Let us first address the question of the county legistlature, which some 25 years ago for one dollar conveyed to the City of Yonkers various parcels of land for use as parks and never utilized as parks. I am dealing only now with those parcels of land which never became parks which are in the same scrub condition that they were in 25 years ago. It seems to me appropriate before the court seriously entertains this motion for the county legistlature to be asked to give appropriate assurances that the land proposed by the City of Yonkers for use in implementing the housing remedy order can in fact be used for that purpose.

Now, I spoke about disabusing anyone of the notion that the forum was simply going to be shifted to another governmental body. I do not think it would be in anyone's interests to ask the county legislature to reprise the long history of this litigation going back to 1980 or the court's 598-page liability opinion or the various proceedings and proposals whcih led to the housing remedy order, nor do I think that it would be appropriate for the county legistlature to seek to impose upon Yonkers or this court conditions with respect to density type of housing, location within these sites of housing, timing and such other matters.

The county of Westchester and the citizens of Yonkers and the parties before the court wil have the assurance that no alternative housing remedy order will be adopted until all the parties have been heard and all the views aired. But if each of the various governmental entities whose approval is necesary individually seeks to attach its own terms and conditions or attempts to review on the merits any aspect of this litigation, the process will simply be unworkable.

Accordingly, I would suggest that the city council of Yonkers at the earliest possible opportunity adopt a resolution which would say in substance: "Whereas the City of Yonkers is under the mandate of the federal court entered in United States v. Yonkers, et al., 80 Civ. 6761 (LBS), to implement its housing remedy orders of May 28, 1986, as amended, (hereafter 'the orders'), and whereas in 1962 the County of Westchester conveyed to the City of Yonkers various parcels of land to be used for park purposes which land is more specifically designated in the description annexed hereto as Appendix A and as hereafter referred to as 'the land,' and whereas said parcels of land have never been used for park purposes, and whereas the City of Yonkers wishes to utilize so much of said land for purposes of complying with the housing remedy orders as the federal court shall provide, and whereas the City of Yonkers wishes to ensure the availablility of said land for said purpose free of any reverter rights or other conditions or encumbrances running to or imposed by the County of Westchester, be it hereby resolved that the City of Yonkers requests that as expeditiously as possible the County of Westchester by its duly authorized representatives, adopt such resolutions or other enactments as shall be necessary and appropriate to permit the City of Yonkers to utilize said land or as much thereof as the federal court shall designate for the construction of housing, pursuant to the orders of the federal court, subject only to such terms and conditions as the federal court shall designate; and be it further resolved that any of said land not so designated during the pendence of United States v. Yonkers shall remain subject to the terms and conditions of the original conveyance from the County of Westchester to the City of Yonkers."

I am not wedded tothe particular language, nor do I purport to be an expert in the drafting of city council resolutions or resolutions of the county legislature, but I do think the substance of that resolution is important.

First, it does not pick and choose among the various sites in question and it does not attempt to impose upon the parties

or the court any conditions to the utilization by Yonkers of the land, using that term as it is defined in the proposed resolution for purposes of implementing the housing order.

Now, I have not even tentatively outlined the mechanism for the requisite action by New York City with respect to the reservoir land, but I think the spirit of this resolution with respect to the county land should furnish an appropriate pattern for a similar resolution.

I would further think that the city council of Yonkers could forthwith adopt another resolution, the substance of which would be along these lines: "Whereas the City of Yonkers has moved the United States District Court for the Southern District of New York (the court) to modify the housing remedy order entered May 28, 1986, as from time to time amended (the order), and whereas the City of Yonkers wishes to insure the availability of such parcels of land as shall be designated by the court after hearing the recommendations of the outside housing advisor and of the parties, and whereas the City of Yonkers wishes to furnish every assurance that it will fully cooperate in every respect with the order and to permit such construction once said order as amended becomes effective, be it hereby resolved that the City of Yonkers waives and supersedes any zoning requirements, need for variances or other local governmental approval or certificates which might otherwise prevent delay or restrict the construction of housing pursuant to said order."

Now, obviously, before housing could be built on any parcels of land, the MHA would require, HUD would require, lending institutions might require appropriate opinions as to title. I don't think we need at this stage that type of detail. But what we do need is the ability of the representatives of Yonkers to say to the court, we not only have the desire and the willingness to implement the housing remedy order pursuant to the parameters of what we have now come to call the Newman plan, but we have the ability to do so.

In adopting these resolutions we give the parties and the court the assurance that we do not have a mental reservation that if there is no other obstacle to the commencement of construction, we can bring forth some variance requirement or some zoning requirement or some other prerequisite which we control which would serve to delay or obstruct implementation of the order, there has been discussion by counsel for Yonkers on the matter of a stay and a proposed time table.

Let me simply say, based on considerable experience with such matters, that that time table is not necessarily so, that it fails to consider the possibility of interim modifications and remands which might deal with matters that objectively and in the abstract we might all agree do not go to the heart of the issues.

The focus of the discussion by Mr. Newman and Mr. Sculnick with respect to a stay tends to focus on the moment a spade might go into the ground, because, as I have said on previous occasions, I do not think that that is the sole or appropriate point of inquiry, because I focus on the process by which a builder is selected and a contract is entered into. And I put myself mentally in the position which at one time I have occupied and which others in this room still occupy of being a legal advisor to a builder who brings to his attorney the request for proposal and says, "Should I bid on this?"

My understanding of what is meant by saying everything would be in place but a spade could not go into the ground, would mean that the proposed contract with the builder would have to have number of clauses in it, one of which would say this construction is cancellable, this contract is cancellable by the City of Yonkers in the event of reversal by an appellate court which presumable would contain some liquidated damage clause to compensate the builder for his time, effort and expense in responding to the request for proposal. And there is prior history in Westhchester County of the cost to governmental agencies when contracts were entered into, for example, by the UDC, and thereafter cancelled.

Secondly, the contract would have to contain a provision which says, Mr. Builder, you have to be ready, willing and able to commence construction within x days after all appellate review has been exhausted, and if the builder were to ask sophisticated counsel how long that might be and sophisticated counsel took into consideration all of the possible permutations and combinations in the appellate process, that would be a rather nebulous time frame, and presumably the builder would, to offset that uncertainty and the necessity of keeping staff available to commence construction within that time frame, would want to have an appropriate adjustment in price, an appropriate escalation clause, and in many instances might respond by saying, "Thank you, City of Yonkers, but no thank you," thereby significantly limiting the field of available builders, possibly-- but most assuredly causing dollars which might go into housing or remain in taxpayers' pockets to be expended.

Now, I recognize you have made me fully aware of the strong desire that exists on the part of the city council and on the part of some residents of Yonkers not to be committed to actual construction unless and until the appellate process has at a minimum advanced beyond its present stage.

I would suggest the following to you. Assuming that the City of Yonkers at some reasonable foreseeable point in time comes before the court and says, "Judge, we can now give you the assurances which you have previously sought, this land is now available to us, the county has agreed, the City of New York has agreed, you need not be concerned about any claims relating to other local governmental approvals that you control, here is the specific plan, here are the sites, and we ask that you amend the housing remedy order to eliminate the present requirements with respect to the density of Whitman and School Four and substitute the Newman plan, but we ask that you stay construction"; that I would then hold a hearing and I would then seek some concrete evidence with respect to the matters with which I have expressed concern, such as the impact of a stay on the field of qualified builders who would respond to an RFP, to the practical costs of placing such

conditions in the request for proposals, a determination who, I assume the City of Yonkers, but it should be clear would require, would bear those additional costs, and in the light or what we then knew some months hence would entertain the stand.

It might very well be that by that point there will be a decision by the Court of Appeals with the Second Circuit. I am the last person to make any predictions as to when decisions in the United States against Yonkers will be forthcoming, I recognize that.

I would give sympathetic consideration after I heard all of this evidence, and I understand Mr. Newman is in the process of inquiring into these questions, to request for a stay which said in substance, construction is not to start until reasonable specifically designated period of time after a decision by the Court of Appeals for the Second Circuit, with the understanding and agreement of the parties that if the district court's housing liability determination is affirmed and the court agrees that some form of affirmative housing relief is appropriate (as contrasted to a simple injunction against further building of a particular type), then the stay would be lifted and the parties would agree that notwithstanding any modifications to the existing housing remedy order as it is now on appeal in the Second Circuit, the amended housing remedy order that would result from these proceedings would be the agreed housing order, the parties agreeing not to seek further appellate review of that amended housing order.

I would give the further following assurance to the parties and to anyone else whose approval is required that if after hearing evidence with respect to the practical consequences of a stay and if after giving, as I have indicated I would do, sympathetic consideration to a stay along the lines that I have just outlined, I should nevertheless conclude that no such stay was appropriate, I would stay an amended housing order to allow the aggrieved parties to seek in the Court of Appeals a stay of the amended housing order.

Now, let's consider what that would be mean. That would mean that before any amended housing remedy order would go into effect, the parties would have the opportunity to go back to the Second Circuit and to say to that tribunal, which would then have had whatever period of time has elapsed since February 2nd when it heard to appeal on the merits, to study the record and to formulate its views with respect to United States against Yonkers for a stay, and to say to that court in essence -- of course, we are assuming that it has not already decided the case--you previously denied an application for a stay, but that was many, many months ago, and this is a new housing order, so you have now had the benefit of whatever study has been given to the record and to the opinion of the court, and this new order, and we renew our application for a stay.

And it may very well be and I am not in any way attempting to predict what the appellate court might do or what is attitude toward such an application might be, but one could fairly represent to the members of the city council and anyone else who was interested, that before the spade would go into the ground, an implementation of a housing remedy order, there would be another opportunity to make an application to a now presumably better informed appellate court for such a stay.

Now, let me also deal with some other matters, and that is, there is a provision in the city's moving papers for community input on selection of sites. Now, community input on selection of sites is essential. It is what we are seeking to obtain, it is that which I initially indicated is of such importance that I would even at this late date entertain the city's motion and agree to some compromise and some delay. But that's a process which should take place between Mr. Newman and the various community groups which he has already been meeting with and consulting with.

So that when the specific plan in made to the court, that process should have taken place and should not be taking place before the court. What I would envision happening is that the

City of Yonkers would get up and say, "Ww have the requisite authorities or sufficient assurance that they will be forthcoming without any of the conditions or provisos which you have indicated would be unacceptable, here is the specific plan for the specific sites for the specific units promulgated after community input and which we ask you now to adopt;" that the court would then hold a hearing, the scope of which would be the appropriateness of that specific proposal, and at the hearing I would entertain the views of the Department of Justice, the NAACP and of HUD.

I would propose that I hold the city's motion in abeyance, believing it to be at present premature, to afford the parties a reasonable time to move forward with this plan, that we reconvene in approximately one month. I would further propose that the order submitted by the Department of Justice with respect to the Whitman site be signed.

I see no reason why a top graphical survey of the six and a half acres of wooded land on the southern portion of the Whitman site should not be conducted, I see no reason why a description of the entire Whitman site in terms of boundary lines and lot and block numbers should not be prepared, I see no reason why the soil bearing capacity of portions of the site as indicated by sample borings, etc., etc., should not go forward. I see no reason why there should be a hold on any of these activities, none of which come in the "spade in the ground" category, and I do feel that what is propelling whatever momentum has been generated has been the imminence of the utilization of the Whitman and School Four sites pursuant to the presently outstanding housing remedy order.

Thus, the parties could be assured, particularly the plaintiffs and the Department of Justice and the class, that even if the city did not obtain all of the requisite approvals or some other insurmountable obstacle that existed, the intervening time would not have been a total loss insofar as actual implementaion of the housing remedy order is concerned.

One further thought and then I will hear further from Mr. Sculnick or from any party who wishes to be hears. Some of the land in question in the Newman plan is owned by the school board. The Newman plan would, of course, as I understand it, permit the school board to retain the existing Whitman building and would involve no relinquishment by the school board of any land which it presently uses for educational purposes.

I would hope that if this is to go forward in the spirit of compromise and accommodation, that no segment of the Yonkers community including the Yonkers School Board would withhold its approval and its consent, and I would hope--I am sure you will, Mr. Dudley, that you would convey that view to the Yonkers School Board.

I would hear now from anybody who wishes to be heard. Ms. Vanderwicken?

MS. VANDERWICKEN: Your Honor, the Department of Justice also agrees that the substance and thrust of the Newman plan is desirable and appropriate and in some aspects preferable to the currently devised remedy plan. However, we would like to point out, while you have noted that the current plan seems to be propelling any community support for the Newman plan, that the current plan is not so terrible. I mean, if it in fact comes to pass, it is a means for providing some public housing on the east side of Yonkers. Both sites are appropriate and are desirable sites for such housing, and we would not like the record to reflect a kind of consistency of agreement that that plan is a negative one.

In addition, the Newman plan has been presented to some degree as a package deal, and we have some indication that the members of the council that voted for the resolution approving the Newman plan did so because they understood certain aspects of that plan as presented were part and parcel of the whole thing, and we would like to make it clear that it is the thrust of the scattered sites, the lower density, etc., which is at

question and not all of the different aspects together, and in fact--

THE COURT: That's not like reapportionment, it doesn't require equal distribution to a mathematical certainty.

MS VANDERWICKEN: Precisely. And if some of the areas end up not having any sites and others have two or three, that that is not a sufficient basis for not going forward with whatever sites become in fact feasible to be developed and are approved.

THE COURY: Provided that there is a recognition on everyone's part, including the part of the court, that the optimum would be a plan which permits one to say to all of east Yonkers that full consideration on the merits has been given to the location of sites throughout east Yonkers, and that if it should come to pass that for whatever reason a particular ward does not have a site, it is not because of the political clout of the councilmen from that ward, nor for any other reason not related to the merits of the site or the potential housing on the site.

Do you have any quarrel with that?

MS. VANDERWICKEN: No. I am a little concerned that the court's description of the hearing that would take place after the city is able to have done the things that you have requested in terms of the resolutions and so on, what the end point of that hearing would be, whether or not that would in fact be stating the sites to be developed and for which RFP's were to go out, and if that would then be sites to be submitted for HUD for its processing of the sites.

THE COURT: Well, I am glad you raised that. I would hope that HUD does not assume a passive role in this because HUD is not a passive participant in all of this, and I would hope that there would be an ongoing dialogue not only between Mr. Newman and the representatives of HUD, but among all of the parties and HUD. And you will see when I even raise

this as a hypothetical, that despite seven years of experience, I haven't lost my innate optimism, if the parties were to come before me and say, "Here is the plan and HUD agrees and the NAACP agrees and the Department of Justice agrees," it would be a very short hearing.

But I would think that the issue to be raised at that hearing would be the stay issues to which I previously alluded, assuming that intervening events had not made that moot, and any disagreements that may exist as among Justice, NAACP and HUD as distinguished from disagreements that may exist between particular Yonkers communities and Mr. Newman.

I would like to schedule a meeting for June 17th at 10:00 a.m.

MR. SUSSMAN: June 17th?

THE COURT: Is that a Wednesday? Yes. Did I say some other date?

MR. SUSSMAN: No, you said June 17th, I thought we had a meeting with HUD this coming Monday, I thought that had been arranged for two o'clock and I didn't know if you were adverting to that meeting or--

THE COURT: No, no, I am not talking about-- the meeting with HUD is simply an apportunity for us all to meet Mr. Baugh and to chat informally about HUD's role in all this.

MR. SUSSMAN: Right.

THE COURT: No, the June 17th would be the adjourned hearing on the city's motion.

MS. VANDERWICKEN: Your honor, is it possible to do it the 18th?

THE COURT: It certainly is. Mr. Newman?

THIS PAGE LEFT BLANK INTENTIONALLY

MR. NEWMAN: It's the first I heard about the meeting scheduled for May 18th. I have a court appearance--

THE COURT: Wait a minute, May 18th?

MS. VANDERWICKEN: There is one with Mr. Baugh on May 18th and then you are discussing the time for the hearing.

THE COURT: That's right.

MR. NEWMAN: I have a court appearance in Florida on the 18th.

MS. VANDERWICKEN: Of May?

MR. NEWMAN: Of May, yes.

THE COURT: I am available any day that week except Friday. Work that out. I think Mr. Newman should be at that meeting.

MR. NEWMAN: I would very much like to be there.

THE COURT: But that's simply a -- I had thought that that would simply be a conference, fairly informal, to try to work out liaison and other things.

Ms. Holmes, I certainly would hope that you would attend that meeting. The June 18th -- now we are talking about Thursday, June 18th at 10:00 a.m. -- is a meeting to take up whatever it is appropriate to take up in connection with the city's motion and the court's sua

Minutes of District Court Proceedings (Sand, J., June 23, 1987)

UNITED STATES DISTRICT COURT JULY 1, 1987
SOUTHERN DISTRICT OF NEW YORK CIVIL RIGHTS
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

YONKERS BRANCH, NAACP,

Plaintiff-Intervenor,

80 Civ. 6761

-against-

CITY OF YONKERS,
YONKERS BOARD OF EDUCATION,

-against-

SAMUEL R. PIERCE, JR.,
Secretary, U.S. Department of H.U.D.,
et al.,

Defendants.

----------X

June 23, 1987
3:00 p.m.

Before:
HON. LEONARD B. SAND,

District Judge

APPEARANCES

SARAH VANDERWICKER,
DORI BERNSTEIN,
Attorneys, Department of Justice

MICHAEL SUSSMAN,
Attorney for Plaintiff-Intervenor

BUTZEL, LONG, GUST, KLEIN & VAN ZILE,
Attorneys for Yonkers Board of Education

JOHN H. DUDLEY,
MARK T. NELSON,
of counsel

and

LAWRENCE THOMAS,
VEDDER, PRICE, KAUFMAN, KAMHOLZ & DAY,
Attorneys for the City of Yonkers

MICHAEL SCULNICK,
and

JAY HASHMALL,
Corporation Counsel for the City of Yonkers

ALSO PRESENT:
OSCAR NEWMAN

THE COURT: Mr. Sculnick, what action, if any, has the City Council of Yonkers taken since the last meeting before the Court?

MR. SCULNICK: Since the last meeting of the court, the city has given extensive consideration to the court's proposed resolutions as part of the motion which the city had filed seeking a modification of the housing remedy order. The city has not to date adopted resolutions along the lines proposed by the court as it believes that the motion which it filed and the resolution that it passed in April setting forth its proposal for an alternative remedial plan should be the one adopted by the court.

The resolutions suggested by the court regrettably had the effect of putting brakes on the momentum built up in the previous weeks, even though I believe it was the court's desire to move along the consideration and adoption of an alternative to the currently in-place remedial plan.

This reaction, I think, stems from a number of factors. First, many Council members and their constituents have grave concerns concerning the court's request or suggestion that it waive all of its zoning and other local codes with respect to the development of housing pursuant to the housing remedy order.

THE COURT: Let me interrupt you there, because I believe the law is clear that a federal court in implementing a housing order may supersede local zoning codes and ordinances. The only reason I made that proposal was because I was at that time seeking to enlist an attitude of community support, an evidence of an attitude of community support, and it was when it became clear to me from some remarks that were made by a City Council member when the court met with the City Council that at least one member of the City Council was under the impression that a dilatory tactic could be pursued of appearing to go along with implementation of the housing remedy order but at the last moment invoking some local ordinance that I made that proposal.

I interrupt you to make that point simply because I would not want anyone to be under the impression that this court believes that it is bound by existing zoning code or ordinances. I simply wanted an acknowledgement on the part of the City Council of Yonkers that it was not going to seek to resort to local zoning codes and ordinances as a way of putting a roadblock into implementation of the housing remedy order.

I interrupted you. You may continue.

MR. SCULNICK: Taking up that point, it is perhaps unfortunate the remark of one Council member would have led the court to believe the city might use existing zoning as a block to legitimate development, and while whatever the court's powers may be in a situation where this the city has acted in a unconstitutional manner, using zoning to frustrate the implementation of a housing remedy order, I don't believe that that's --

THE COURT: The bottom line of what you are telling me is that the City Council has done nothing, and I take it you are also telling me that the City Council intends to do nothing in response to the court's suggestions.

Is that the gist of it?

MR. SCULNICK: Quite frankly, no, your Honor. I know that it may appear that way, but that is not the gist of it at all.

THE COURT: Tell me what it is that the City Council proposes to do, and when it proposes to do it.

MR. SCULNICK: The City Council, after considering the proposed resolutions made by the court, and for reasons I don't need to elaborate perhaps, would be unwilling to go forward with the resolutions that the court proposed, has been attempting to come forward with a plan which responds to the concerns of the court, and under the leadership of the city administration and with the assistance of the housing adviser

has been trying to put together a plan which meets the two objectives that the city seeks to achieve through its proposed modification, specifically equal distribution of the housing units throughout the six wards, and the lower density associated with that development, and to that objective in the last week effort has focused on trying to identify a site in each ward which would be suitable for development of public housing and in total would yield the two hundred units required under the order.

Unfortunately, at least one of the sites identified in one of the wards was under private control, and efforts to speak with that developer and to try to get --

THE COURT: So nothing has happened, so that the City Council hasn't said, "We adopt this resolution to deal with these five sites and one other site as yet to be identified."

MR. SCULNICK: It was the city's desire to adopt one resolution to cover all 6 sites.

THE COURT: When do you anticipate the City Council will pass such a resolution?

MR. SCULNICK: I can't give you a date, your Honor, but the city administration is making sincere efforts to proceed with that as quickly as possible and trying to line up a resolution which would gain majority support.

THE COURT: The genesis of all of the activity in the recent months was a motion brought by the Department of Justice to hold the City of Yonkers in contempt, and I believe the proposal which led to the appointment of the outside housing adviser and the activities of the past months were all viewed as an alternative to a finding of contempt.

Why would it not be appropriate for this court to allow the City Council some modest additional period of time, say five or ten days, with the understandint that unless within that five to ten day period the City Council adopted a plan substantially

along the lines previously indicated the City of Yonkers would be in contempt and the court could proceed to impose appropriate fines and sanctions?

MR. SCULNICK: Your Honor, although the appointment of the housing adviser clearly grew out of the government's motion to hold the city in contempt, I wish to distinguish between the creation of a plan pursuant to part 6, which was the specific aspect of the government's motion, that being one aspect of the housing adviser's work which can be completed and which would satisfy the court order. But in the course of preparing that plan, as I understand it, Mr. Newman came to the conclusion that the aspects of the existing housing remedy calling for the development in the densities proposed on Whitman and School 4 were not in the best interests of the long-term success of those individual projects, and, therefore, suggested that in addition a reexamination of the two units of public housing should proceed.

As far as contempt, I think it would be inappropriate to link contempt to the efforts to refashion the remedy for the two hundred housing units, because an order is in place that could proceed which in the outside housing adviser's view is not the best order that is available, but Mr. Newman can complete his proposal and submit it to the court under part 6, and there should be no cause to raise the spectre of contempt.

I really think the two should be separated. The city's motion came shortly after the court itself issued --

THE COURT: What assurance are you prepared to give the court that the City Council will ever take any action? We had a number of meetings about five weeks ago, and we laid out a timetable of what was to happen, and the court was aware that there were some reservations on the part of the City Council, but in effect nothing has happened.

The net action by the City Council has been no action.

You say that I am incorrect when I state a perception that the City Council in fact intends to do nothing. Tell me what you think would be a reasonable period of time for the City Council to adopt a resolution along the lines I have indicated or a resolution which it believes would meet the needs of the situation to do something affirmative?

MR. SCULNICK: If I may have a moment --

THE COURT: Yes.

MR. SUSSMAN: While Mr. Sculnick is conferring, I would like to introduce Mr. Hailes, a member of the NAACP, and a member of the bar of District of Columbia, and know I would like to move his admission for this matter.

THE COURT: There being no objection, the motion is granted.

MR. SCULNICK: Your Honor, I can't predict. However, I think the city has made progress in identifying at least four sites of the six that would be necessary. I believe that substantial progress has been made, and that --

THE COURT: That perception I have to tell you is not shared by the court. This is Tuesday. By Monday of next week, if the City Council of Yonkers has not passed a resolution, I will understand that it is its intent not to take any action, and I will then reexamine the alternatives in the light of that situation.

Do you have anything further you wish to say?

MR. SCULNICK: No.

Minutes of District Court Proceedings (Sand, J., July 9, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, 80 Civ. 6761

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Invervenors,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

July 9, 1987

CITY OF YONKERS; and
YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-party Plaintiffs,

-against-

THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; AND SECRETARY OF HOUSING AND URBAN DEVELOPMENT.

Third-Party Defendants.

----------X

Before:

HON. LEONARD B. SAND

APPEARANCES

DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
WASHINGTON, D.C.
BY: SARAH VANDERWICKEN

NAACP
BY: MICHAEL SUSSMAN

CITY OF YONKERS & YONKERS
COMMUNITY DEVELOPMENT AGENCY
VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
BY: MICHAEL SCULNICK

YONKERS BOARD OF EDUCATION
BUTZEL, LONG, GUST, KLEIN & VAN ZILE
BY: JOHN B. DUDLEY

DEPARTMENT OF H.U.D.
BY: RICHARD LARIZZA

JAY HASHMAL
Yonkers Corporation Counsel

ALSO PRESENT:

OSCAR NEUMAN
Housing advisor

DR. JOSEPH PASTURE
Monitor for the School

NICHOLAS DeSANTIS
City Manager

(Telephone conference call)

THE COURT: Hello.

Now, we have a reporter who has not handled the previous Yonkers hearing, so would everybody who is on the line please state their name and who it is they represent.

MR. SCULNICK: Michael Sculnick representing the City of Yonkers.

MR. PASTORE: Joseph Pastore, the monitor for the school.

MS. VANDERWICKEN: Civil Rights Division, Department of Justice.

MR. SUSSMAN: NAACP.

MR. HASHMAL: Corporation counsel.

MR. LARIZZA: Raymond Larizza representing H.U.D.

THE COURT: Nobody advised Mr. Newman that the in-person conference had been converted to a telephone conference call, so he is in the room. Before we turn to the matters which led Mr. Sculnick to request this conference, I would like to raise another matter, and that is I received this morning from Mr. Sussman copies of a correspondence with Mr. Carl Tibbets concerning the Section 8 existing program, and Mr. Sussman's objection that there had been no response on the merits to the suggestions that he made.

There is a letter from Mr. Tibbets indicating that he had been newly assigned to Yonkers and that he would respond at his earliest opportunity but that has not yet happened. My chambers placed a call to Mr. Tibbets this morning to attempt to find from him directly when that response might be forthcoming. He was out and a message was left.

Mr. Larizza?

MR. LARIZZA: Yes.

THE COURT: Would you undertake to find out from Mr. Tibbets when a response on the merits to Mr. Sussman's letter is going to be forthcoming, and if it is not going to be forthcoming within a week, may I have an affidavit stating the reasons why that is the case.

MR. LARIZZA: Very well.

THE COURT: All right, Mr. Sculnick, you requested this conference.

MR. SCULNICK: Yes, we did, thank you, your Honor. We had requested a conference in chambers and recognizing that telephone calls are always a bit awkward, let me get right to the point. On Tuesday night, the City Counsel adopted both resolutions ordered by the court in its July lst order.

In addition to those resolutions, the city council has also adopted a modified version of its April 15th resolution which specifically identifies an additional four sites for a total of eight sites to be used for the 200 units of public housing. So it is built upon the four sites, four school sites idenitified by the court, and adds to it four additional sites, the purpose of which would be to try to reduce the density on the four school sites, particularly Whitman.

The city's resolution, as with the April 15th resolution, is conditioned upon the granting of a stay by the court and the setting of a cap for the production of new subsidized housing. The City Counsel resolution was a product of compromise, give and take, some want it more, some want it less, but on the whole, the city believes it sets forth a workable plan, one which the City Council can actively sell to the community as a better plan for the 200 units.

Now, before I get into any more specifics or respond to questions from the court or other parties, I want to introduce the manager who wishes to speak to the substance of the resolution for a moment.

MR. DeSANTIS: Your honor--

THE COURT: Mr. DeSantis, you have to speak up. You are not coming across clearly enough for the reporter.

Would you start again, please.

MR. DeSANTIS: For the first time, I think, as a result of the resolution that was passed, the City Council, of which Mr. Sculnick stated, has on the mandate of the court order of July 1, responded with a positive response from the community. That response from the community still needs to be nurtured.

The council people who have developed this plan, as well as some of the civic leaders who had made a request to develop the plan, continues to need nurturing, needs to develop more support in the community so that at some point when and if in fact housing is built, clients of the plaintiffs who will be living in that housing will be able to assimilate to the community.

I do believe, your Honor, that some of the elements of the resolution are quite reasonable: a request for a stay is reasonable, requests for a cap on the housing is reasonable and, your Honor, as I had stated back in April, that there continues to exist within the white and black community certain people who would like nothing better than to see this plan also be not acted upon or rejected, to further strengthen their opposition to the City of Yonkers ever coming to a positive resolve of the housing problems within the city.

THE COURT: I have some questions.

MR. DUDLEY: This is John Dudley. I have just been hooked into this, so let me say good morning.

THE COURT: Good morning.

MR. DUDLEY: I note it is 5 of 11, I don't know how long this has been going, but I am just coming on the line now.

THE COURT: It hasn't been going very long. Let me bring you up to date. I first dealt with some matter concerning the Section 8 existing which I think does not directly affect the School Board. Mr. Sculnick just then came on and advised of the adoption of the three resolutions, and Mr. DeSantis made the statement that I think you have heard.

Let me make one observation with respect to the stay. You know, we started talking about the stay some time ago, and it is now on July 9th, and I suggest that we just leave open for the present the question of a stay. It may very well be an academic matter before everything else is resolved. So let's not spend time now on the pros and cons of a stay pending a Court of Appeals determination, that is whether it should 30 days or 60 days or 90 days, and let's focus on the other matters.

Mr. Sculnick or Mr. DeSantis or anyone, and unfortunately I do not have -- Mr. Newman has -- I was just about to say I don't have the resolution before me. I just came off the bench in the middle of a trial.

(Pause)

THE COURT: With respect to these eight sites, who owns Kardash Park?

MR. SCULNICK: Kardash Park was transferred by the county 25-odd years ago.

THE COURT: They are in the county land covered in one of the other resolutions?

MR. SCULNICK: Correct.

THE COURT: What about Andrus Field?

MR. SCULNICK: Andrus Field is a city-owned park facility and the only portion which is contemplated for this would be an area that now is covered by, I think, a pair of tennis courts.

THE COURT: Is Andrus Field one of the sites that had been originally considered for Yonkers High?

MR. SCULNICK: No, I don't believe so.

THE COURT: Now, you say that's a city-owned park facility. Who has to approve of that being used for some purpose other than a park, any governmental body other than the City of Yonkers?

MR. DeSANTIS: If I may add to that, the state dededicated, and the City Council will make the necessary dededication.

THE COURT: So that requires state --

MR. DeSANTIS: State action.

THE COURT: State action.

MR. SUSSMAN: That's for Kardash as well.

MR. SCULNICK: I don't believe so because it would be our position that the portions which are suggested for housing were never improved with park facilities, i.e. a ball field or other improvements. Improvements on Kardash or Redmond, if they were part of the facility sought to be used for housing, would require state legislative dededication, but it is our opinion because these are the unimproved portions, that only county waiver is necessary.

MS. VANDERWICKEN: It may or may not be true. The issue of whether or not a portion of a site which was originally considered one whole site and a part of which is in fact park land, the issue of whether or not the unimproved and the portion not ever used as park can be considered nondedicated is not really resolved under state law, so that's an open question.

THE COURT: Before you speak, the reporter is getting a little frantic, you must state your name; otherwise the reporter is not going to transcribe what you say.

MR. SCULNICK: The comment by Mr. Sussman with regard to how many state actions are necessary, I believe that only one action is necessary to dededicate a park land, and the reference to two successive actions deals with a constitutional amendment which would not be necessary for dededication of park land.

THE COURT: Tell me about Hillview Reservoir, who owns it?

MR. SCULNICK: Hillview Reservoir is owned by the City of New York.

THE COURT: That's the city water land.

MR. SCULNICK: Yes.

THE COURT: Now, my overall reaction to this is, first of all, to acknowledge the weight of Mr. DeSantis's observation that in some respect this can be viewed as a positive response from the community, to use his term. And I'm obviously aware of and disturbed by the last paragraph of the resolution which says that "In the event any portion of this resolution is not complied with, the entire resolution be deemed null and void." I don't quite know what that means.

I understand why for a political reason it was put in, but I am not sure that the question of any action to be taken with

respect to this plan is now before me because at a minimum the county has to act, the City of New York has to act, and with respect to Andrus Field, apparently the state has to act. And, of course, the state legislature is soon to be in recess.

What, Mr. Sculnick, is it that you would propose that the court do now in light of the adoption of this resolution?

MR. SCULNICK: Your Honor, I would propose that the court acknowledge this resolution as the groundwork upon which the remedied plan proceed and with respect to each of the various sites. Given the resolution as a whole, work would continue in terms of all the planning, RFP's and so forth for each specific site; that all of those could go forward subject to the contours of the plan, the issuance of the stay and so forth.

MR. SUSSMAN: Your Honor --

THE COURT: I just want to understand, and forgive me for cutting you off, Mr. Sussman, I have had the benefit of your letter and your views on this, but I don't think one should rush to judgment on this resolution, nor do I think, and I say this pointedly to you, Mr. Sussman, do I think one should rush to a negative response to this when it may yet prove all to be unrealistic.

And if the county turns down two of the sites, and if the City of New York turns down one of the sites, and if the indication from the state is negative, then -- well, if any one of those things happen by virtue of the nonseverability provision put in the resolution by Yonkers itself, the whole thing falls, and I don't see a harm, and I'll let you address this, in permitting the City of Yonkers to move forward in obtaining the clearances for these parcels of land.

And then we can examine it. If after a short period of time it develops that all of them are available or that some of them are available and others not, then we deal with the nonseverability provision, provided, of course, that at the same

time we are moving forward with the alternative proposals, whatever that may be.

MR. SUSSMAN: May I be heard on this?

THE COURT: Can you wait just a moment.

I wanted to hear from Mr. Dudley, and maybe you have not had an opportunity to take this up with the School Board subsequent to this resolution, but one of the statements that had been made with respect to the School Board was that the School Board had not been presented with any formal request from the City Council, and, of course, up until the other evening, the City Council had not adopted a request to the School Board, but there is a request now -- have you seen this, Mr. Dudley?

MR. DUDLEY: Your Honor, I have not. I did talk with Mike Sculnick yesterday morning and Mr. Sculnick told me what was in the resolution. Oscar Newman called me and also told me about the substance of the resolution, so I believe I am familiar with the substance of it.

THE COURT: Let me read it. It is one paragraph which said: "Be it further resolved that the City Council hereby requests the Board of Education to declare as surplus those portions of the school property to be used for public housing pursuant to this resolution and court order and return same to the city.

"Be it further resolved that the city shall build additional tennis courts and other recreational facilities at School 30 and Walt Whitman to more than replace any loss of such facilities."

And my question was whether there had been sufficient time for the School Board to consider its response to that resolution and that request.

MR. DUDLEY: I did have an opportunity yesterday, I was in Yonkers yesterday and I did have an opportunity to brief

Superintendent Batista on what I understood was the substance of the resolution. I doubt that there's been an opportunity by him to brief the Board. My own assumption from yesterday has been that the Board will have to meet and consider the resolution from the city because of the message coming over from the city, and I would think the Board, under any circumstances, would have an obligation to respond to that.

THE COURT: Mr. Sussman.

MR. SUSSMAN: Thank you, judge.

I just wanted to point out a couple of things, and perhaps we can get clarification on them. First of all, on page 3 of the resolution, the resolution states "that in the event the court grants a stay as set forth above and limits the construction of housing as requested above" that being a reference to 200 additional units, 100 new construction which is set forth in the paragraph proceeding, then and only then, as I understand it from Mr. Sculnick, will the City Council take the actions set forth below.

THE COURT: Well, that's not clear and it is something we ought to clarify because the first resolution does not ---

MR. SUSSMAN: I don't have that, I'm sorry.

THE COURT: The first resolution was a request of the county containing no such condition, and this third resolution, the one with the eight sites, does contain that provision. The resolution to the county says "Be it resolved that the City of Yonkers hereby requests that the County Board of Legislators of Westchester issue a binding declaration." It has no condition on that, so that there's an unconditional request made of the county legislators.

In this third resolution, that request is phrased conditionally with respect to Redmond Field and Kardash Park.

MR. SUSSMAN: And the Hillview site.

THE COURT: Let me ask Mr. Sculnick, or anyone else, are these requests to the county and to the city and the state to be made only in the event that I agree to the stay and the limit of construction?

MR. SCULNICK: Let me explain. The court is correct in that the first two resolutions adopted by the City Council, the substance of which was required by the July lst order, that is an unconditional presented request of the County of Westchester to release its reverter rights on all sites designated by the outside housing which does include Redmond and Kardash, so that request has been made and transferred to the county.

THE COURT: Because I had made it clear in response to questions that had been raised what my position would be if the two resolutions that were the subject of my direction were passed in some conditional form, and my response was that that would be unacceptable.

Now, let me ask you a very specific question.

MR. SCULNICK: I hadn't gotten to that. The alternative resolution, that's No. 141, should be seen as an entirely separate proposal by the city to the court, and notwithstanding any other resolution adopted by the City Council which is the language contained --

THE COURT: All right, now if the general counsel for the County of Westchester asks the city, is this request now before us unconditionally with respect to Redmond Field and Kardash Park, you are telling me the answer is an affirmative?

MR. SCULNICK: Yes, that is in the affirmative pursuant to resolution No. 140.

THE COURT: All right. I would think it appropriate that that possible ambiguity be made clear to the county.

MR. SCULNICK: The purpose of resolution No. 141, and the top paragraph of page 3 to which Mr. Sussman makes reference, is to set a whole separate proposal and to indicate that the city will take all necessary steps to attempt to gain control over the sites listed in that resolution for the purposes set forth in that resolution.

THE COURT: Now, let's address the language at the top of page 3. I had been suggesting that it was premature for me to deal with this alternate plan unless I had some further assurances that it was realistic, not a view that I am expressing for the first time.

Mr. Sussman points out that the first three lines on page 3 say: "Be it further resolved that in the event the court grants the stay as set forth above and limits the construction of housing as requested above," is it your understanding that the City Council wants those determinations to be made by the court prior to a determination of the availablity of these lands and these consents?

And if the answer to that is yes, what is your understanding of what happens if I were -- and it is a very remote possibility -- to agree to give that sort of an advisory ruling and then it should turn out that one of these properties or one of these consents is not forthcoming?

MR. SCULNICK: Your Honor, it is the intent of the City Council resolution to request a court determination prior to the making of these requests of the other parties, but the resolution itself sets forth the intent of the Council to make those requests and there should be no doubt that those requests will be made.

THE COURT: Well, then I'm not so sure I agree with Mr. DeSantis about this being a positive response from the community because we deal with this after you had educated me for seven years in the operations of things in Yonkers. Don't think that I would be so naive as not to consider the possibility of my accepting the conditions set forth in the first

three lines of page 3, only to be faced with the wink or the nod to the County of Westchester not to grant the approvals.

MR. DeSANTIS: This is probably one of the most sincere acts of the Yonkers City Council in the eight years that I have been involved here in the City of Yonkers. There is no slight of hand intended here, there is no wink of eye intended here, the resolution is one that should be viewed in its entirety as a good faith and sincere effort of an alternative housing plan to benefit the entire city.

THE COURT: The time table for the county is what?

MR. DeSANTIS: At the time the resolution was put together, we were looking at what the time table of the county would be, but I can say this, that we would be willing to send up this resolution to the appropriate levels of government if we can get some sort of -- I'm not an attorney, I preface my remarks with that -- some sort of advisory understanding as to some of the elements contained within the resolution.

THE COURT: Mr. Sussman, do you want to finish your comments?

MR. SUSSMAN: We would simply say that the issue of the stay is, I think, important and we have opposed the stay and we continue to oppose the stay for reasons I have in part outlined in the submission of today. I think given the fact that the court order that was signed on July lst specified for Mr. Neuman a time table fairly reasonable in terms of the quickness to produce his long-term plan, that is the appropriate time for the court to hear argument and, if necessary, take evidence as to how many additional units should be constructed.

For the city to set as a precondition now that 200 units, 100 new construction should be agreed to and set as a condition for their alternative to the 200 public using units, I believe is totally unrealistic and unreasonable, and I urge the court to reject that condition, not to accept it; and if acceptance is necessary for the

city to now go forward, our view is that the city should be told to go forward under the alternative that we have outlined in our comments on the unit configuration, which would include one additional site, so as to hopefully make Whitman both less dense for public housing and allow the School Board to use Whitman.

But I do not believe that this is meant in good faith. I was at the meeting, I talked with Council members, and I think this is nothing more than a continuation of an attempt to get a delay.

THE COURT: Well, let me ask the city representatives, if I were to say I reserve decision on the requests that have been made for a stay and a cap, but I reaffirm my willingness to consider any alternative plans which are presented, which are coupled with the necessary authorities and authorizations, and say to the City of Yonkers: Go to it and get your ducks in order so that when it comes time to approve a plan, you will be in a position to tender this as an alternative plan, what would happen?

MR. HASHMAL: The city would greatly prefer if the court considered granting the stay initially. We understand that the request concerning the overall limit on the long-range housing plan should probably await consideration until Mr. Newman submits to the court and all parties his recommendation.

But I think what the city manager and the city's position is, is that it would greatly enhance the ability of the city administration and governing body to work with the community if a stronger indication concerning the stay was issued by the court.

MS. VANDERWICKEN: Could I speak for a moment?

THE COURT: Yes.

MS. VANDERWICKEN: We have numerous problems with this resolution beyond the ones already spoken about. In terms of the stay, your Honor has already said that you would

not grant it without an evidentiary hearing on the effects of a stay on the costs and the availability of developers, and that seems to me is a burden that the city needs to meet before you should consider a stay.

In addition, various aspects of this resolution are inappropriate and should not be considered as a whole. The last paragraph that you already noted was a problem, is a serious problem and this is being put forward as an entity, no part of which could be cut and retain the city's support.

We believe that the order that you issued on July 1 is a reasonable approach to the remedy to get it moving. There has been enormous delay and that every moment that there seems to be some point to move forward, the city comes in with some new plan, and the plan always is so conditioned that it really has no substance to it.

I really believe, and we believe, that we should move forward with the time table set forward in your plan. If the county is willing to make available these sites, those can be made part of the additional units that Mr. Newman is planning, and we should just move forward on the four sites, the four school sites with possibly a diminution of units with the idea that some additional space may be found, possibly the part of Whitman where the school building now exists.

THE COURT: But I'm sure, of course, you recognize that there's some utility from the standpoint of creating the housing in Yonkers, of getting these approvals and getting them as soon as possible.

I want to come back to what Mr. Hashmal said because if I understood it, he was saying that his appraisal of the political climate was that there would be a willingness to amend the resolution to remove the cap, provided the stay were granted.

MR. HASHMAL: That is not what I had meant, your Honor. Maybe I should rephrase it?

THE COURT: Yes.

MR. HASHMAL: I said that the intent of the resolution recognizes that the determination by the court concerning the requests by the city to have a cap would probably not be able to be considered until you had before you Mr. Neuman's recommendations, and that the city would be perfectly willing to go ahead with implementing the resolution and making the necessary requests and taking all necessary action pending a determination by the court as to the suitability of the request of the cap.

Not that we were planning on amending the resolution; that would be a very difficult thing to do at this stage, but that the city recognizes that the court would probably be unwilling to make a determination as to the suitability of the cap until you had before you the recommendations of Mr. Neuman, because it had been the city's position all along that the information provided to Mr. Neuman was that the cap was a reasonable one.

THE COURT: All right, but now what is the logical consequence of what you just said? What you have just said is you recognize that one of the conditions that the resolution seeks to impose is premature, and I would not be in a position to grant it, yet it is put forward as a condition to a resolution which is not severable. So the consequence is that there's really nothing before me.

MR. HASHMAL: Not exactly, your Honor. The city would be willing to make the request of the other governmental agencies and bodies, and those requests, of course, would attach a copy of the resolution, and in the event the court disagreed with the city and was unable to establish that cap, the requests that we had previously made, we would advise those governmental bodies that the requests were no longer effective.

MR. SUSSMAN: I would like to try to bring this to what I think might be a reasonable closing point, perhaps. I think it is

very reasonable if the city believes in its best interests to come forward with an alternative plan --

THE COURT: Let me interrupt you because you realize that it isn't personal, but it is political, that it may be more appropriate that some suggestion comes form me rather than from counsel for the NAACP.

What I would be inclined to do is to issue a document, I don't know exactly what I would caption it, but a document which says that I recognize the desirability of proposals by Yonkers, and that prior to final action on any plan, I would give due consideration to any proposals made by Yonkers for alternate sites or configurations as to density and so on; that before I can consider any alternative, I have to have assurances that the alternative is viable and meets all the necessary criteria.

That, of course, includes H.U.D., so that I encourage Yonkers to proceed as expeditiously as possible to obtain the consent needed for for their alternative proposal; that if and when Yonkers comes before the court and makes a showing that it has either obtained formal approvals or persuasive informal approvals, I will give careful and sympathetic consideration to such a proposal.

What I want to do is this, just to be perfectly frank: Mr. Hashmal has acknowledged that this document, which is said to be nonseverable and to be null and void if any part of it is not acceptable, contains provisions in it which are just not acceptable, and I don't want to simply reject it for a number of reasons.

One is, I don't want to reject any proposals which might in fact increase the options and provide suitable sites for housing. And I certainly don't want to discourage Yonkers' participation in this process, and that's why I used the phrase "careful and sympathetic consideration," but I think it is just totally unfair and unrealistic to expect me to accept this resolution in toto; and as long as there's a severability provision, a

nonseverability provision in there, as long as there's one thing that's unacceptable, then there's nothing before me.

MR. HASHMAL: Two observations, your Honor. I just wanted to point out for the record that the sites and the numbers next to the sites on page 2, it does not necessarily flow that if one of the smaller sites were not given over to the city as requested, that this proposal would fail. The Hillview Reservoir was not given to the city by the City of New York with the numbers given and it is still possible that land could go forward.

THE COURT: All right, I think we are really saying the same thing. What I would like to do is to send a positive signal to the City Council, which is to say: I'm listening, as I said, I think, on July lst, I am not closing any doors. You have crossed a major threshold, pursue it, and come back to me again, and come back to me again when questions like the one that Mr. Hashmal was just addressing have been resolved.

In the meantime, of course, we have to go forward.

MR. HASHMAL: I don't want to be repetitive but I would like to reemphasize that these requests will be going to other elected officials and I would simply want to emphasize that it is much more likely for them to act responsibly if there was a stay in effect, or at least a better indication that a stay was in effect if they in fact --

THE COURT: No, I have said already some months ago when the City Council was about to pass, we thought was going to pass a resolution, I think we were talking then about 60 days, and I assure you that I will be reasonable about that matter. I don't want Yonkers to waste money, I said that in the past.

We are now in the second week of July and most courts like to deal with matter on their docket before the fall. I assure you I have no indication of when the Court of Appeals might decide this matter, but I really don't think anyone should be

hung up by the prospect of something being torn down or some excavation being started and then to have an appellate court reverse so that that was wasted money, I think that's a red herring.

MR. DeSANTIS: is there some way that what you just stated could be embodied in the document?

THE COURT: What I have said?

MR. DeSANTIS: Well, I recall, and I don't know when it was, but it was in the courtroom, you did make the statement back then that you as a judge would not do anything that would provide irreparable harm for the city and just reiterates what you discussed.

THE COURT: Let me explain, if I can, why I don't simply enter an order which says anything will be stayed, and at the same time I assure you that I don't want to waste any money, there are many, many possible combinations and permutations of what an appellate court could do. If they say, Judge Sand, everything in your opinion is correct except for some minor little thing which does not affect the overall implementation of the plan, I don't want then to have to deal with an argument that that's grounds for holding everything up.

I really don't know how I can say it any more clearly that I do not want to cause any waste, that I think that we will have heard from an appellate court long before a spade goes into the ground, and that this should not be a concern to anyone in Yonkers.

Let me tell you another reason why it is an unnecessary source of anxiety. Although it takes an appellate court or any other court long periods of time before an opinion is issued in a matter as difficult, with as lengthy a record as this one, the court knows how it is going to decide the case long before the opinion is filed. And if it should ever come to pass that a spade was about to go in the ground and the Court of Appeals had not yet spoken and an application was made to me for a stay

and I denied it, Yonkers would go to the Court of Appeals, to the same panel that would have had this case under advisement for many, many months, and renew its application for a stay to the very court that knew how it was going to decide the case.

So the thought that construction is going to be undertaken, and then only to find that it was all unnecesary because there had been a reversal of the decision, is really an emotional issue. I understand it, I understand people saying you are going to disrupt my neighborhood and the appeal hasn't been decided yet, but I think the people who are responsible for informing the citizens should recognize that that is not a realistic horrible.

MR. DeSANTIS: I understand that. I understand that you understand it also, but I think the purpose, the full purpose of it, even though the stay in and of itself is academic, it is related to what happened in the court itself, and it is necessary to gain acceptance in the community for the plan, and eventually if the court continues to maintain this as a remedy, that there will be acceptance and the people will feel that they can be dealt with fairly, and this is the point I think that we are trying to convey here.

MR. SUSSMAN: I have been listening and I really feel that people will be deal with fairly, I don't know who Mr. DeSantis speaks for, he certainly doesn't speak for the plaintiff. I think the message of a stay at this time in light of the long delaying activity by the City Council would be a very devastating one to the plaintiff, and I don't want to get into it anymore, but I find that this discussion is really almost offensive.

No stay has been granted by any court for good reason, and that's because on the merits no stay is warranted, and I find this political calculation game really not to be highly appropriate in light of what we are discussing. Irreparable harm is not going to be caused in any event by 40 units of the housing, it is required by H.U.D. and the city agreement with

H.U.D., in any event, and I really don't feel the court should be entertaining this in this light.

To meet the political needs of the city officials is not the primary goal of the court, nor should it be.

MR. DeSANTIS: I don't want to get into an argument with Michael, but I think that Michael's continued adamant approach --

THE COURT: That's not going to get us anywhere. Give me one moment. I want to write something out.

(Pause)

THE COURT: Mr. DeSantis and gentlemen and Miss Vanderwicken, you tell me, and primarily Mr. DeSantis, you tell me whether you think it would help or exacerbate your problems if I added to that other language: "Insofar as any request for a stay is concerned, if it should come about that construction is about to commence prior to any ruling by the Court of Appeals on the pending appeal, the court will give such application for a stay consideration in the light of all the circumstances then obtaining."?

MR. DeSANTIS: I certainly think that would help, and I think it demonstrates that you are trying to be sensitive to the situation.

MS. VANDERWICKEN: We have no problem with that, your Honor.

THE COURT: Mr. Sussman, do you have any problem with that?

MR. SUSSMAN: I have made my views known.

THE COURT: All right. That's a very judicious response.

"Let me read again what I propose to say. In substance -- before I do that, I'm not quite sure about this, is the department of H.U.D. satisfied with the manner in which the HAP has been adopted?

MS. VANDERWICKEN: We haven't actually seen the resolution approaching the HAP and I'm not sure H.U.D. has had a chance to see the HAP.

MR. LARIZZA: Bill McKenna of H.U.D. did not have it as of yesterday.

THE COURT: All right, what I want to do is acknowledge the passage of the three resolutions, to acknowledge that the two resolutions satisfy the court's order unless somebody tells me that they haven't--

MS. VANDERWICKEN: Your Honor, we haven't gotten to that really. The one resolution to the county that is straightforward does not include in it in the information that you asked for in your July lst order.

THE COURT: My understanding was that that was going to accompany the submission.

MS. VANDERWICKERN: Oh, okay. Am I wrong about that, Mr. Sculnick?

MR. SCULNICK: No, you are absolutely right, and we have been compiling all of the information on the sites Mr. Newman has requested, and I believe we have almost everything together. Every site Mr. Newman wishes to list, we will have the requisite information and we will supply it to all parties.

MS. VANDERWICKERN: One other point, and that is that I understand that the county requires the city to acknowledge or state that the parcels in question have not been used for park purposes, and have not been by the city dedicated park land.

THE COURT: Well, I take it that will be part of the submission. You are going to send, Mr. Sculnick, you will send to the court and to the parties the proposed submission to the county prior to submitting it to the county, isn't that right?

MR. SCULNICK: Yes, your Honor.

THE COURT: All right. Assuming, then, that one can say that the two resolutions satisfy the court's order, I would then address the third resolution and say that the court recognizes the desirability of participation and constructive suggestions from the Yonkers City Council, and that prior to any final action on any plan, I would give any due consideration to any proposals made by Yonkers for alternative sites or configurations or population density.

Before I consider any alternative, I would have to have assurances that the alternative is a viable one and it meets all the necessary criteria. The court, therefore, encourages Yonkers to proceed as expeditiously as possible to obtain the consent needed for their alternative proposals, and if and when Yonkers comes before the court and makes a showing that it has either obained formal approval or persuasive informal approvals, the court will give careful consideration to any such proposals;

That insofar as any requests for a stay is concerned, if it should come about that construction is about to commence prior to any ruling by the Court of Appeals on the pending appeal, the court would give an application for a stay careful consideration in the light of all the circumstances then obtaining.

MS. VANDERWICKEN: I have one more question. Under your proposed time table from the July lst order, the approved RPF's for Whitman and the School 4 sites are supposed to be available by July 13th. Presumably those RFP's would be shortly ready to go out with some number of units listed on them.

THE COURT: Yes.

MS. VANDERWICKEN: We will need some closure fairly shortly on the density on at least those two sites.

THE COURT: Yes.

MS. VANDERWICKEN: And I guess I am just asking you to confirm that we are going to proceed with the original plan of using the four school sites unless some alternative becomes really available before that can be carried out.

MR. SUSSMAN: August 5th is the date for all final submissions in the order for the hundred units, your Honor, and my contemplation drafting it is that everything would be submitted to you; that you can determine whether to have further proceedings and how to issue that order.

The fact that the RFP's were due by the 13th would not mean before your Honor issued a final order on the 200 units, and that process should start hopefully on the 5th when you have everything before you, which I, I assume, will include whatever Yonkers has in the form of formal assurances, as your Honor stated, or informal.

THE COURT: Right, I think that's no need to change that 13th date, that should go forward with the understanding that August 7th is the date for final submissions with respect to those 200 units.

MR. DUDLEY: Your Honor --

THE COURT: I was about to direct a questions to you, and that is, do you have any thoughts as to what the School Board's time table might be?

MR. DUDLEY: That was pretty much the point I wanted to bring up. I think there's from the standpoint of the Board a little bit of a contradiction in timing here and I don't know what

the resolution of it would be. Right now the evidentiary hearing is scheduled to start on the 15th and we are prepared to go ahead on the 15th.

On the other hand, we now have a resolution from the city that's coming over to the Board that I said a moment ago I think the Board would obviously have an obligation to consider, but the problem is that, as I understand it, the city is really coming to the Board and to the other entities and saying here is an overall package that we would like to put together in the interests of what we deem to be a good housing remedy, are you are willing to contribute your share or can you contribute your share to that overall proposal?

The problem, though, is that the court isn't going to be in a position even to consider the overall proposal for some time for the reasons your Honor mentioned earlier.

THE COURT: That's a few paragraphs, a few lines in a School Board resolution which says this consent is being given on the understanding and on the condition that there will be an overall package substantially along the lines proposed.

MR. DUDLEY: I guess what I am saying, though, it puts the Board potentially in an awkward position. I don't want to forecast what the Board's position will be vis-a-vis the Council resolution, but suppose, and I am afraid anything I say may have the effect of being misleading, which is what I'm afraid of.

THE COURT: That's a good admonition to yourself, I think, maybe to not encumber the record with your concerns. This isn't a unique situation in a litigation or a negotiation when there are various parties with various interests and people are being asked to contribute and they want to make sure that there's an equal distribution of benefit and burden on all entities. I understand that.

MR. DUDLEY: I understand that too. What I am saying is that if the Board were for any reason inclined to look with

favor on the City Council resolution, there obviously would be an inconsistency, then, in the Board proceeding with an evidentiary hearing.

THE COURT: Oh, I am prepared to adjourn that. Why don't you simply write me a letter saying that in light of the subsequently enacted Board resolution, you withdraw wihtout prejudice your request for an evidentiary hearing reserving the right to reinstate the request prior to the time any, prior to August 7th.

MR. DUDLEY: That's very helpful, thank you.

THE COURT: All right.

MR. LARIZZA: It is always the question of what goes first, but obviously one of the questions that will arise if this is to happen, if all the other obstacles can be overcome, is whether these additional sites contained in the Council's resolution would meet H.U.D. criteria, and I don't know whether H.U.D. has ever looked at Kardash Park or Redmond Park or Andrus Field or Hillview Reservoir.

MR. LARIZZA: Hillview Reservoir they have seen, I'm not sure of the others.

THE COURT: Mr. Neuman said that H.U.D. has seen everything but Andrus. Well, mayube H.U.D. should take a look at Andrus and just quickly raise a red flag if any of this is going to create a serious H.U.D. problem.

MR. LARIZZA: This would be a preliminary evaluation?

THE COURT: That's right.

MR. LARIZZA: On your April 13th order, we will add Andrus Field to the list?

THE COURT: Yes.

MR. LARIZZA: I believe that will be acceptable.

THE COURT: All right, anything else?

Mr. Larizza, don't forget about Mr. Tibbets and the Section 8 existing?

MR. LARIZZA: I will take care of that immediately.

THE COURT: Thank you, have a good day all.

Order (Sand, J., July 10, 1987)

U.S. v. YONKERS BD. OF EDUC.
Cite as 662 F.Supp. 1575 (S.D.N.Y. 1987)

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court,
S.D. New York.

July 10, 1987.

U.S. Dept. of Justice, Civil Rights Div., Washington, D.C., Sarah Vanderwicken, for plaintiff U.S.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, Michael W. Sculnick, New York City, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, John B. Weaver, John H. Dudley, Mark T. Nelson, Detroit, Mich., for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civ. Div., Raymond Larizza, Calvin E. Davis, Washington, D.C., John W. Herold, Office of Litigation, U.S. Dep[t. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

OPINION

SAND, District Judge.

By letter dated July 8, 1987, counsel for the City of Yonkers forwarded to the Court copies of three resolutions adopted by the City Council on July 7, 1987:

> 1) Resolution No. 139-1987 with respect to the adoption of a Housing Assistance Plan (Appendix A);
> 2) Resolution No. 140-1987 with respect to a request to the County of Westchester (Appendix B);
> 3) Resolution No. 141-1987 with respect to an "alternate plan" (Appendix C).

Resolutions Nos. 139 and 140 are said by the City to be in compliance with this Court's Order of July 1, 1987 (Appendix D). At a telephone conference among all the parties held at the City's request on July 9, 1987, counsel for the Department of Justice advised that the Department was not yet in a position to state whether or not Resolution No. 139 was adequate. The Court directed that counsel for the Department and HUD expeditiously review the matter and promptly advise the Court if there were any perceived inadequacies in that resolution.

Counsel for the City, at said conference, assured the Court and the parties that Resolution No. 140 (the request to the County) was a separate, completely independent resolution and was not subject to any conditions or qualifications set forth in Resolution No. 141. Nor was Resolution 140 superseded by Resolution No. 141. (See Transcript, July 9, 1987). Counsel for the City further assured the Court and the parties that the City intended to furnish to the County, together with its request, the amplifying data set forth in this Court's July 1st Order and that the City would furnish the Court and the parties with copies of such submission prior to transmission to the County Here too, the parties are to advise the Court as soon as possible if they believe that there are any inadequacies in this resolution's compliance with the July 1st Order.

Resolution No. 141 proposes an alternative plan and seeks to impose conditions upon the Court before the City would seek to obtain the necessary consents and waivers. The conditions include a 90-day stay; a limit of 100 on the amount of construction in addition to the first 200 units; a prohibition against mixing affordable and public housing. The resolution which proposes eight sites also contains a proviso that if any portion of the resolution is not complied with, the entire resolution is to be deemed null and void. The resolution recites that it is enacted pursuant to a request by a number of east side civic groups listed in the resolution.

As the Court advised the parties at its July 9th conference, the constructive participation by the Yonkers City Council and these and other civic groups in the formulation of a housing remedy is welcomed and is to be encouraged. Before the Court would enter any final order directing the construction of any housing, it would give due consideration to any proposals made on behalf of Yonkers including proposals involving alternate or additional sites and densities. However, before any such alternatives could be seriously considered, the Court would have to be assured that the proposals were viable and met all relevant criteria. In this regard, the Court directed HUD to conduct a preliminary evaluation of the Andrus Field site,

the only site listed in the resolution not previously inspected by HUD.

The Court urges Yonkers to proceed as expeditiously as possible to obtain the consents and waivers needed to demonstrate the feasibility of its alternative plan. If and when Yonkers comes before the Court and makes a showing that it has either obtained formal approvals for the sites or a persuasive showing that the requisite approvals have informally been given, the Court will give careful and sympathetic consideration to any such alternative plan. In the interim, the parties are, of course, to proceed pursuant to the timetable set forth in the July 1st Order.

Insofar as any request for a stay in concerned, if it should develop that construction is about to commence prior to any ruling by the Court of Appeals in the appeal now pending before that Court and any party shall move for a stay of such construction, the Court will also give such an application careful and sympathetic consideration in the light of the conditions then obtaining. It is not the intent of the Court to require that any wasteful or counterproductive action be taken. The Court further assures the parties that it will permit a sufficient interval of time between any ruling of this Court with respect to a stay and the commencement of construction to enable any party dissatisfied with any aspect of this Court's ruling on such an application to seek appellate review of this Court's determination.

As was acknowledged at the July 9th conference, any determination as to the total number of units eventually to be constructed pursuant to the housing remedy order prior to the receipt of the Outside Housing Advisor's reports and the comments of all the parties would be premature. No such determination of the total number of units to be built or of any mix of public and affordable housing will be made, however, without a full hearing, at which the views of Yonkers will be carefully considered.

SO ORDERED.

APPENDIX A

BY VICE MAYOR OXMAN:

WHEREAS, pursuant to the Order of the Hon.. Leonard Sand, United States District Judge, entered May 28, 1986 in the matter entitled "U.S.A. v. City of Yonkers etc." in part VIII thereof the City of Yonkers was required to prepare and approve appropriate Housing Assistance Plans in a timely manner; and

WHEREAS, pursuant to said Court Order the plaintiffs have previously submitted a Three Year Housing Assistance Plan dated June 19, 1986 with a period of applicability from October 1, 1985 to September 30, 1986; and

WHEREAS, on advice of Appellate Counsel and without prejudice to our rights on appeal,

BE IT REVOLVED that the City of Yonkers, in City Council convened, hereby adopts the attached Housing Assistance Plan for the fiscal year 1987 with a period of applicability from October 1, 1986 to September 30, 1987 for Grant No. B-85-MC-36-0112 as the Second Year of the Three Year HAP approved July 11, 1986 and the City Manager is directed to forward same to the U.S. Department of Housing and Urban Development, Community Development Block Grant Program, Entitlement Program.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 9 to 4, Minority Leader Longo, Councilmembers Palais, Spallone and Fagan voting "NAY.'

COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM
ENTITLEMENT PROGRAM

HOUSING ASSISTANCE PLAN For FY '87

City of York

B - 6 5 - M C - 1 6 - 0 1 1 2

HUD APPROVAL

- 12/1 '86 to 9/30/87 | ☒ Original ☐ Revision ☐ Amendment | SUBMISSION ☐ 1 ☒ 2 ☐ 3

HUD APPROVAL OF HAP, PARTS I-III, BY REFERENCE Part I, Handbook of the HAP approved 7/11/86

[illegible] contained in this [illegible] shall [illegible] submission. (Latest amendment date of the HAP, Parts I - III, if any)

PART IV - ANNUAL HOUSING ASSISTANCE GOALS

PROGRAM OR PROJECT (Exclude Annual Rental Housing Programs to be Provided Rental Rehabilitation and Owner Programs Separately)	HUD	UNITS TO BE ASSISTED: NUMBER OF UNITS	UNITS TO BE ASSISTED: HOUSING TYPE	LOWER INCOME HOUSEHOLDS TO BE ASSISTED: ELDERLY	SMALL FAMILY	LARGE FAMILY	TOTAL
Rental Rehabilitation Program	x	20	Rehab	2	12	6	20
Section 8 Existing (Renters)	x	25	Existing	8	14	3	25
Section 312 Rehabilitation Program (Renters)	x	15	Rehab	4	8	3	15
[illegible] Rehabilitation Loan and Grant Program (Renters)		18	Rehab	5	10	3	18
CDBG Rehabilitation Program (Owner)		12	Rehab	2	5	1	8

APPENDIX B
BY MAYOR MARTINELLI AND VICE MAYOR OXMAN:

WHEREAS, on July 1, 1987 the Hon. Leonard B. Sand, United States District Judge, entered an Order requiring the City Council to adopt certain resolutions under threat of contempt of court which would result in devastating fines to the taxpayers of the City of Yonkers, and

WHEREAS, the adoption of this Resolution is in compliance with the Order of the Court and is without waiver to the City's right to appeal from the Order requiring the adoption of this Resolution;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yonkers that the City of Yonkers hereby requests that the County Board of Legislators of Westchester County issue a binding declaration that with respect to those specific sites designated by the Court-appointed outside Housing Advisor, Oscar Newman, pursuant to Paragraph 9 of the Court Order entered July 1, 1987, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of the Hon. Leonard B. Sand in the action entitled *United States of America and Yonkers Branch NAACP v. Yonkers Board of Education City of Yonkers, etc.* Docket No. 80 CIV 6761 and that we request that the County take prompt action in responding to this request.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to forward a certified copy of this Resolution forthwith to the Clerk of the Board of Legislators of the County of Westchester.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX C

BY MAYOR MARTINELLI, VICE MAYOR OXMAN, COUNCILMEMBERS BURGRES, NUCKEL, MANGIERI, WASCISKO AND RESTIANO;

WHEREAS, the United States District Court, by the Hon. Leonard B. Sand, in Order entered July 1, 1987 has determined that the first 200 units of public housing shall be built on Walt Whitman Junior High school, Lincoln High school, School No. 4 and School No. 30, and

WHEREAS, the Court has required that the City adopt a resolution requesting the County of Westchester to waive its reverter interest in all County surplus property identified by Oscar Newman for the construction of any housing pursuant to this Court Order, and

WHEREAS, the City Council on April 15, 1987 adopted Resolution No. 69-1987 suggesting that the Court adopt an alternate housing plan which would reduce the density of public housing on the school sites and thereby reduce the impact of such housing on the surrounding neighborhoods with several conditions incorporated therein, and

WHEREAS, on or before July 6, 1987 a number of east side civic groups including Crestwood Civic Association, Armour Villa Taxpayers Association, East Yonkers Homeowners and Wildlife Association, Lawrence Park West Neighborhood and Homeowners Association, Mohegan Heights Homeowners Association, Sunnyside Park Community Association, Taxpayers of Northeast Yonkers, Beech Hill Civic Association, and Victory Heights Homeowners Association, adopted a resolution requesting that the City Council renew its attempts to pursue the alternative housing plan provided certain conditions are incorporated within that plan while the City pursues its appeal to the fullest extent, and

WHEREAS, it is imperative that the City Council protect the taxpayers of the City of Yonkers from potentially devastating fines as well as a finding of contempt and at the same time minimize the potentially devastating effect that wide spread housing development would have on the east side of Yonkers without waiving any of the City's rights in pursuing its appeal of the Court's Orders in this case.

NOW, THEREFORE, BE IT RESOLVED, that the City Council in accordance with the Resolution adopted by the East Side Civil Associations listed above, request the Court to consider implementing an alternative housing plan pursuant to Resolution No. 69-1987 adopted on April 15, 1987 except as modified below.

BE IT FURTHER RESOLVED, that the City Council reserves all of its rights on its appeal in the matter entitled *United State of America v. City of Yonkers* and reaffirms it commitment to appeal the liability Order and the Housing Remedy Orders and all other Orders to date all the way to the Supreme Court of the United States, if necessary.

BE IT FURTHER RESOLVED, that the City Council requests that the Court modify its Order placing 200 units of public housing on only the four school sites and instead reduce the density of each site and to place no more than the following number of units on the following sites:

Walt Whitman Junior High school—38-41 units
School No. 4—38-41 units
Lincoln High school—38-41 units
School No. 30—8-10 units facing or adjacent to Nevada Place only
Kardash Park—30-36 units
Redmond Field—10-12 units
Andrus Field—16-18 units
Hillview Reservoir—10-12 units
all in a semi detached or town house style.

BE IT FURTHER RESOLVED, that the City Council requests that the Court grant to the City of Yonkers a stay of construction of any public housing units until 90 days following the date of the decision of the City's appeal to the Second Circuit Court of Appeals and that the Court not place any affordable or other housing on any site on which the Court directs public housing to be built and that not more than 200 additional units of affordable or other housing be provided pursuant to the Housing Remedy Order, with not more than 100 to be new construction.

BE IT FURTHER RESOLVED, that in the event the Court grants a stay as set forth above and limits the construction of housing as requested above, the City Council hereby requests the County of Westchester to waive any present or future interest including reverter rights in those residual parcels known as "N" (Redmond Field), and "X" (Kardash Park) for the municipal purpose of Court Ordered public housing and for no other purpose notwithstanding any other resolution adopted by the City Council; that the City Council requests that a small portion of Andrus Park be dedicated as parkland, if necessary, but only to the extent of small southerly portion of the park up to and including the first two tennis courts for the construction of Court Ordered public housing as set forth in this resolution; and that the City Council hereby requests from the City of New York and/or the City of New York Water Board the transfer of a certain small portion of the Hillview Reservoir property along Shipman Avenue for the construction of public housing as set forth above.

BE IT FURTHER RESOLVED, that the City Council hereby requests the Board of Education to declare as surplus those portions of the school property to be used for public housing pursuant to this resolution and Court Order and return same to the City.

BE IT FURTHER RESOLVED, that the City Council declares that no further housing pursuant to the Court Order would be constructed on school property.

BE IT FURTHER RESOLVED, that the City shall build additional tennis courts and other recreational facilities at School 30 and Walt Whitman to more than replace any loss of such facilities.

BE IT FURTHER RESOLVED, that in the event that any portion of any of this Resolution is not complied with the entire Resolution be deemed null and void and with no effect.

Adopted by the City Council at a stated meeting on July 7, 1987 as amended by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX D

ORDER

SAND, District Judge.

On May 28, 1986, this Court issued its Housing Remedy Order which required the City of Yonkers to take certain specific actions to cure the intentional racial segregation found in this Court's liability Opinion, 624 F.Supp. 1276 (S.D.N.Y.1985). The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action.

In this light and cognizant of its responsibility to insure implementation of the 1986 Housing Remedy Order, the Court, on the joint application of the United States Department of Justice and the Yonkers Branch-National Association for the Advancement of Colored People, hereby orders:

I. *PUBLIC HOUSING*

1. By July 3, 1987, the Outside Housing Advisor (hereinafter "OHA") shall submit to the Court and the parties

his proposal, including unit distributions, for the 200 units of public housing reserved by HUD through its Consent Decree with the plaintiff-intervenors (as approved by this Court on March 19, 1984). In submitting this proposal, the OHA shall utilize the following sites: Whitman; School 4; Lincoln High School and School 30. The OHA shall also include in his proposal a statement of the unit distributions and other consequences which would result if only the Whitman and School 4 sites were utilized for the 200 units.

2. With respect to the School 30 and Lincoln High School sites, HUD shall forthwith provide funds if necessary to complete site surveys and preliminary analysis deemed necessary for its review.

3. By July 9, 1987, HUD shall report to the Court any and all steps necessary for resolution of the "historic preservation" review regarding School 4 and its timetable for their accomplishment. The Court has previously determined and now reaffirms that the black-top across from School 4 on Trenchard Street is considered part of the School 4 site for purposes of this Order.

4. By July 13, 1987, the parties shall submit to the Court comments concerning the OHA's proposal. If the Yonkers School Board opposes the utilization of portions of the Lincoln High School and School 30 sites for these purposes and wishes an evidentiary hearing on this issue, it shall so advise the Court and such hearing will be held on July 15, 1987 at 10:00 A.M. and continue until concluded.

5. By July 13, 1987, HUD shall submit to the Court the final and approved RFPs, as proposed by the Municipal Housing Authority, for the Whitman and School 4 sites. By this date, HUD shall advise the Court whether these RFPs or either of them may be used for the Lincoln High School and School 30 sites and, if not, what changes it deems required for such use.

6. By July 27, 1987, HUD shall review the suitability of School 30 and Lincoln High School (such portion as the OHA designates) for the units of public housing proposed by the OHA and shall apprise the Court and the parties of any specific deficiencies these sites may possess for the intended uses. By the same date, HUD shall also inform the Court of any measures it believes should and may be taken to mitigate these deficiencies and thereby improve the sites for their intended uses.

7. By August 7, 1987, the parties shall submit to the Court any further written submissions deemed relevant to the development of the 200 units of public housing on the sites identified by the OHA. Thereafter, the Court shall determine whether further proceedings should precede entry of a final Order.

II. *LONG TERM HOUSING PLAN*

8. The May 28, 1986 Housing Remedy Order required the City of Yonkers to submit a long term housing remedy plan by November 15, 1986. The City failed to do so. After the Department of Justice moved to hold the City in contempt of court for this failure, among other acts of non-compliance with the Remedy Order, and the plaintiff-intervenors moved for the appointment of a Housing Master to take required remedial activities, the Court permitted the City to nominate an Outside Housing Advisor. In light of the events which have transpired subsequent to this nomination, the Court directs that the OHA shall cease functioning as representative or designee of the City and shall act solely in the capacity of an advisor to the Court pursuant to the provisions of paragraph IV-F. of the Housing Remedy Order.

9. By July 7, 1987, to facilitate implementation of the long term housing remedy, the Court hereby directs that the OHA advise the Court and the parties of those sites formerly owned by the County of Westchester which the OHA believes may be suitable for housing to be built pursuant to the long term housing plan.

10. By July 15, 1987 the City of Yonkers shall request from the County of Westchester a binding declaration that, with respect to the sites designated pursuant to paragraph 9 hereof, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of this Court. The City shall request prompt action by the County. In making its request of the County, the City shall provide pertinent information showing (a) the uses, if any, to which the parcels in question have been put since 1961, (b) any current municipal plans (developed before March 1, 1987) for such parcels and (c) the uses to which comparable parcels have been put heretofore. By July 13, 1987, the City shall furnish to the Court and the parties a copy of its proposed request of the County, including the foregoing information.

11. By August 7, 1987, the OHA shall provide the Court and the parties with his proposal for a long term housing remedy plan.

12. This plan shall both identify sites (publicly and privately held) which the OHA deems potentially feasible for the provision of assisted housing, housing other than new construction or rehabilitation on the identified sites and enumerate those contributions to the development of such housing which the City of Yonkers should be required to make. This plan shall present alternatives assuming a final goal with respect to assisted units of 200, 400, 600 or 800.

13. By August 22, 1987, the parties shall submit comments concerning the long term housing remedy proposal. The Court shall then determine whether further proceedings are necessary before entry of a final remedial Order.

14. On or before July 9, 1987, the City shall adopt and submit to HUD (with copies to the Court and the parties) a Housing Assistance Plan (HAP) for its Year 13 Community Development Block Grant application (as required for the receipt of grants by the Housing and Community Development Act of 1974, as amended. The HAP shall be in good faith

compliance with the relevant statutes and regulations and consistent with the City's well defined prior commitments, undertakings, and the terms of the Housing Remedy Order.

15. Should the OHA determine that technical studies, including surveys, soil borings, etc. are required for the development of the long term housing plan, he shall promptly and in writing request same from the City Manager. Within three (3) business days of any such request, the City Manager shall respond in writing indicating (a) that the City shall provide the requested support or (b) an explanation of why the City declines voluntarily to provide the requested support, or some of it. The OHA shall promptly submit any such negative response to the Court, with copies to the parties, for resolution.

16. Failure to implement the actions required by this Order shall be cause for entry of a finding of contempt against the City of Yonkers and against those City officials who, it is determined, have intentionally frustrated this Order. The City of Yonkers is hereby placed on notice that if the City is found to be in contempt of this Order or any provision hereof, it is the intent of this Court, in addition to any other sanctions which may appear to the Court to be appropriate, to impose a fine for each day of non-compliance. It is further the present intent of this Court that said fine be at a daily rate pursuant to the following formula: (a) $100 for the first day of non-compliance after entry of a finding of contempt and notice; (b) the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court by 4:30 P.M. on each day that the Clerk's Office is open representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be earmarked, escrowed, or otherwise allocated for any special purpose of fund. The amount of funds previously

paid shall not be refundable. The City of Yonkers is directed to furnish a copy of this Order forthwith to the Emergency Financial Control Board for the City of Yonkers.

17. The City is also hereby placed on notice that this Court shall take those actions, as specified herein or otherwise determined to be required, to implement the Housing Remedy Order, regardless of the City's continued non-compliance. As set forth in paragraph 16 hereof, non-compliance by the City of Yonkers may result in a finding of contempt and appropriate sanctions against the City and its officials. However, such non-compliance shall not thwart or frustrate implementation of the Housing Remedy Order and whenever feasible and appropriate the Court may, in its discretion, itself act or direct others to act with the same force and effect as if those actions had been taken by Yonkers itself.

18. Without prior written approval of this Court, the City of Yonkers shall issue no building permits with respect to any City-owned or controlled land or property.

Without prior written approval of this Court, the City of Yonkers shall not sell, transfer or otherwise encumber any City-owned or controlled property.

SO ORDERED.

Minutes of District Court Proceedings (Sand, J., July 15, 1987)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

80 CIV. 6761 (LBS)

Plaintiff,

-and-

YONKERS BRANCH NAACP, et al.

Plaintiff-Intervenor

-against-

YONKERS BOARD OF EDUCATION
CITY OF YONKERS, AND YONKERS
COMMUNITY DEVELOPMENT AGENCY,

Defendants

----------X

Before:

HON. LEONARD B. SAND,

District Judge

New York, N.Y.
July 15, 1987 - 10:00 a.m.

APPEARANCES:

SARAH VANDERWICKEN, Esq.
Department of Justice

MICHAEL SUSSMAN, Esq.
Attorney for Plaintiff Intervenor

BUTZEL, LONG, GUST, KLEIN & VAN ZILE, Esqs.,
Attorneys for Yonkers Board of
Education
BY: JOHN H. DUDLEY, JR., Esq.,
of Counsel

VEDDER, PRICE, KAUFMAN, KAMMHOLZ
& DAY, Esqs.,
Attorneys for City of Yonkers
BY: MICHAEL W. SCULNICK, Esq.,
of Counsel

JAY B. HASHMALL, Esq.,
Corporation Counsel, City of Yonkers

RAYMOND M. LARIZZA, Esq.,
U.S. Department of Justice,
Civil Division
Attorneys for HUD

OSCAR NEWMAN,
Court-appointed outside Housing Adviser

THE COURT: Mr. Sculnick, in the court's order of July 1, dealing with the subject of requests by the City to the county for relinquishment of any reverter rights, the court provided, in paragraph 10, that "By July 15, the City shall furnish to the court and the parties a copy of its proposed request to the county," which request to the county was being made on July 15.

At the telephone conference on July 9, at page 31, Ms. Vanderwicken raised the question of the submission that was to be made to the county and additional adequate information was going to be furnished and the following colloquy takes place.

"THE COURT: Well, I take it that will be part of the submission. Are you going to send, Mr. Sculnick -- you will send to the court and the parties the proposed submission to the county prior to submitted it to the county, isn't that right?

"MR. SCULNICK: Yes, your Honor."

Late yesterday afternoon I learned, not from you, Mr. Sculnick, but from the outside Housing Adviser, that there had in fact already been sent by the City to the County of Westchester a request for the relinquishment of any reverter rights with respect to only those sites contained in the City's resolution.

The first question to you is, is that accurate? Was such a document sent?

MR. SCULNICK: Yes, your Honor.

THE COURT: And is the record clear that it was sent without any notification or prior submission to the court?

MR. SCULNICK: No. Let me explain that, your Honor. I'm not sure. I think there has been some confusion here.

THE COURT: Do you have the document that was in fact sent to the county?

MR. NEWMAN: I gave a copy to Mr. Sussman.

MR. SCULNICK: I don't have it in front of me.

MR. SUSSMAN: There are eight documents altogether that was sent on July 10th, the day after the conference call. I just got them from Mr. Newman. I hadn't seen them before right now.

MR. SCULNICK: May I explain for a moment or try to respond to your question? Because I think that there has been

some misunderstanding, and I don't think that the City has in any way violated the spirit or intent of the court order.

It has been my understanding that Resolution 141, which is the City's alternative plan, and I explained this during the telephone conference, is a separate, distinct -- does not override, does not supersede the prior resolution, 141, which is the one that had been directed under the July lst order.

THE COURT: Yes.

MR. SCULNICK: And that when I responded, and it has been my complete understanding that with respect to the Resolution No. 140 the court ordered one, that all supporting documentation would be reviewed by the court.

THE COURT: Tell me, please.

MR. SCULNICK: Your Honor --

THE COURT: Two separate things. Tell me what the purpose is. Is it the fact that the sites contained in those documents I have yet to see in your unilateral submission to the county includes sites which are to be included pursuant to the second resolution?

MR. SCULNICK: Yes. There are two that are included.

THE COURT: Now, tell me what the purpose was of a separate submission solely with respect to those two sites. What was the purpose of that?

MR. SCULNICK: I believe that we were under an obligation to do that, your Honor, in order to respond to the substance of the July 9 telephone conversation, which was, "City, get your ducks in a row as to your ultimate plan and then the court will give it consideration."

THE COURT: And what do you think the impact is likely to be, and one can only assume was intended to be, of the

county receiving two separate requests from the City, one being the request for two sites in what we'll call the City's alternative plan, and the second, subsequent request being for a larger number of sites pursuant to a court order? What do you think the obvious, clear message to the county will be of receiving those two separate requests?

MR. SCULNICK: That the request is that as to all those parcels designated by the OHA, their reverter rights should be released so as to permit the court and the City to proceed with the housing remedy order, and that if the City is in a position to be able to convince the court that an alternative remedy plan should be presented, that those two sites should be used for public housing.

At the same time, your Honor, that the request was submitted to the county, requests were sent to the state and the City of New York with respect to those parcels mentioned in Resolution 141, Andrus Field and the Hillview Reservoir.

THE COURT: So that when you said to the court on July 9, "Yes, your Honor, we will submit copies to the parties and to the court prior to sending them to the county," you thought that these resolutions dealing with implementation of the same housing remedy order and dealing with the same sites did not come within the scope of that request?

MR. SCULNICK: That's correct, your Honor. And in addition, none of the supporting documentation which will be submitted to the court and is to be reviewed by the court has been submitted to the county with respect to the Redman and Kardash sites.

So that there was no outstanding court order requiring the City to submit any kind of supplemental or supporting documentation as to those sites on an alternate plan and none was submitted to the county.

THE COURT: There is a very careful timetable that was spelled out, you see. And we go back to July lst. We worked

with the English language. Paragraph 9 called for the OHA to designate the site by July 7. And paragraph 10 called for the request to the City with respect to those sites.

I can only accept your statement that that's what you understood it to mean. I have to tell you that I accept it with very great skepticism.

MR. SCULNICK: Your Honor, it saddens me that the issue of veracity is an issue, and I assure you that there was no intent to deceive the court. As a matter of fact, your Honor, it is my recolleciton that when I called the court's chambers on Friday morning to find out when your opinion would be available, I advised the court clerk that the reason I had called and the reason I was anxious to get that opinion was that Mr. DeSantis was going on vacation, that he was anxious to send out the opinion along with the request to the other governmental agencies.

I wasn't withholding anything. I had no desire to deceive the court.

THE COURT: Let's accept that. Isn't the necessary implication to the county of getting two separate requests a clear signal that one is intended to be acted upon favorably and the other is not?

MR. SCULNICK: No. I don't believe it is, your Honor. I believe that they both can be acted upon favorably.

MS. SANDERWICKEN: Your Honor, I think in the record right here should be placed the language in Resolution 141, which is the basis that the City is claiming for sending the letter to the county, and that is: "Be it further resolved that in the event the court grants a stay," et cetera.

THE COURT: A little slower.

MS. VANDERWICKEN: "In the event the court grants a stay as set forth above and limits the construction of housing as

requested above, the City Council hereby requests the County of Westchester to waive any present or future interests, including reverter rights, in the two residual parcels, Redman Field and Kardash Park, for the purpose of court-order public housing, and for no other purpose, notwithstanding any other resolution adopted by the City Council."

Your Honor, that language in itself put the lie to what the City is claiming now.

THE COURT: Well, you see, and then you can look again at the transcript.

MR. SCULNICK: Just the opposite, your Honor.

THE COURT: What?

MR. SCULNICK: I'm sorry.

THE COURT: If you look at the language --

MR. SCULNICK: There is a misunderstanding here. But just the opposite. That resolution as adopted --

THE COURT: Let me ask you this. Do you have any problem with sending a letter to the County Board of Legislators withdrawing this request and substituting for it a request, a single request, which contains all of the sites pursuant to paragraphs 9 and 10 of the July lst order?

(Pause)

MR. SUSSMAN: Judge, did you read this letter? I don't know if you had the opportunity. I think it would be important for you to read the letter. I think that might save my having to --

(Pause)

THE COURT: The answer to my question?

MR. SCULNICK: Your Honor, I think that that would tend to highlight as opposed to reduce the apparent inconsistency between the two.

THE COURT: Well, with respect to the other sites, is the City also going to say the Board's adoption of this resolution is vital to the City of Yonkers and we would really appreciate placing this on the agenda for the next available meeting or, indeed, calling a special meeting for the purpose of considering this item?

MR. SCULNICK: Your Honor, they should go on the same agenda. There is no reason at all --

THE COURT: My question was, is the City prepared to use that exact language with respect to the other sites? Mr. Hashmall is shaking his head no.

MR. HASHMALL: Your Honor, may I be heard?

THE COURT: Yes, indeed you may.

MR. HASHMALL: It is the City's position that the two resolutions deal with two different kinds of housing. The court-ordered resolution deals with the affordable housing, and the alternative resolution deals with housing, public housing, which has a set limit and set guidelines and the City Council has spoken on those housings and has come up with an alternative plan.

THE COURT: You are now telling me with a negative response to my questions as to this last paragraph -- you are now emphasizing and making crystal clear that the City of Yonkers is sending a message to the county that there are two sites that it wants cleared and wants cleared promptly, and that it has not the same interest with respect to the other sites, the purpose of which, obviously -- please let's after seven years assume some minimal level of intelligence and sophistication on the part of the court -- is to send a clear message to the

county as to what it wants accepted and what it wants rejected, with the consequence that the decision whether or not to accept the alternate plan or to take some other route on what is the appropriate usage of these lands in connection with the overall housing will not be made by the court but will have been made by the City Council in the form of its request to the county.

Isn't that obviously what is intended here, Mr. Sussman?

MR. SUSSMAN: I think there is another problem, and I don't mean to complicate matters, but the other problem that we have is one of timing. And I do want just factually to make sure the record is clear on this, because this is a serious issue.

The County of Westchester has one meeting in July and no scheduled meetings in August. By the Chairman of the Board of Legislators, Mr. Brady, to whom that letter you referred to is addressed, your Honor, the county may call exemplary or special sessions.

I received a call last night from Mr. Keith, and I am not going to go into all details because I don't think it is appropriate on the record, but what Mr. Keith told me was that, and I am simply talking about the legislative rules, which I think the court should understand, the county by any member of the county legislature, your Honor, and these are the rules of the county legislature, Mr. Keith is a legislator and has been since January 1984, and he related this to me.

Any member of the legislature, your Honor, can get up and say, "Move the matter over." That is a prerogative of any member of the legislature of the county. And it is his information, having spoken with other legislators, that a particularly powerful legislator from Yonkers has already indicated that he intends to do that.

Now, that obviously hasn't happened yet, because we don't know if it will in fact happen. But the reason I am raising it is that these messages are occurring in a certain context already, which is that the legislators themselves are up

for election in November and, you know, we are exercised here in perhaps another simply delaying tactic.

I think a clear deadline by the court should be set for this consideration alternative.

THE COURT: I intend to set another timetable.

May I also read to you from page 17 of the July 9 conference, and I say:

"Don't think I would be so naive as to not consider the possibility of my accepting the conditions set forth in the first three lines of page 3 only to be faced with a wink or nod to the County of Westchester not to grant the approval.

"MR. DeSANTIS: This is probably one of the most sincere acts of the Yonkers City Council in the eight years that I have been involved here in the City of Yonkers. There is no sleight of hand intended here. There is no wink of the eye intended here.

"The resolution is one that should be viewed in its entirety as a good faith and sincere effort of an alternative housing plan to benefit the entire City."

Well, there was no wink or sleight of hand. There was a very obvious device utilized, without the knowledge or consent of the court or, I take it, the other party --

MR. SUSSMAN: We were not informed, your Honor.

THE COURT: -- to communicate to the County of Westchester what it is that the City wanted and what alternative the City did not want the court to have, for example, to take a particular parcel of land and to request a reverter only with respect to a portion of it, presumably then precluding the use of the balance.

You are shaking your head no. That is not intended?

Let me say, if I am misreading this, if I am doing you personally an injustice, I apologize. But that was the colloquy between you, Mr. Sculnick, and the court on the record, and I've read it into the record.

Then it seems to me you shouldn't waste any time. It is a very simple matter. You, Miss Vanderwicken, Mr. Sussman, Mr. Dudley and other counsel and Mr. Newman should retire to the room adjacent to the courtroom and should draft a clarifying letter to Mr. Brady to be sent this afternoon, which withdraws this and which requests, using the same language with respect to the importance and urgency with respect to all of the sites that are set forth in Mr. Newman's submission.

Now, are you willing to do that?

MR. SCULNICK: I have no problem with that, your Honor.

THE COURT: All right. That's what we will do, then. We will adjourn now and counsel are directed -- they may use the witness room to the rear -- to draft a letter to be sent to Mr. Brady by hand this afternoon which modifies the previous submissions and which includes all of the sites.

MR. SUSSMAN: It would help us in our work if we could know now whether it is the court's view that there should be some mention of timing with regard to this.

THE COURT: I think the language of Mr. DeSantis' letter of July 10 is very appropriate language.

MR. SUSSMAN: Thank you.

THE COURT: All right. We'll adjourn this matter. I will be available. You let me know when the parties have agree on the substantive letter.

Mr. Newman, I take it you have the list and the enclosures that would go with that?

MR. NEWMAN: Yes.

THE COURT: Thank you.

MR. LARIZZA: Will there be other matters to be taken up when we reconvene?

THE COURT: Well, there is another matter, and I received by hand two letters from the HUD. One dealt with Section 8 existing. The other dealt with the preliminary analysis of the Lincoln and School 30 site.

MR. LARIZZA: Your Honor, I believe that letter was intended to satisfy paragraph 6 of the July lst order.

THE COURT: Yes.

MR. LARIZZA: And is not --

THE COURT: Have any counsel seen that?

MR. SUSSMAN: Yes, your Honor, we have, or I have.

THE COURT: I think the matter of the letter to Mr. Brady has priority.

MR. LARIZZA: I am at the court's disposal. I don't need to participate in that. But if you have other matters you want to address later on, I will stand by.

THE COURT: I will resume as soon as the parties tell me they have drafted the letter.

(At 11:12 a.m.)

THE COURT: All right. During the adjournment, have the parties agreed on the language of a letter to go to Mr. Brady?

MR. SUSSMAN: Yes, your Honor. We have met for about a half hour and we have agreed to the following language:

The same initial language, addressing it to Mr. Brady.

"Dear Mr. Brady.

"The City of Yonkers hereby withdraws its letter dated July 10, 1987 and substitutes the following:

"Enclosed please find City Council Resolution No. 140-1987 adopted by the Yonkers City Council on July 7, 1987.

"The City of Yonkers would respectively request that the County Board of Legislators place on its agenda a resolution waiving the County's reverter interest in the sites listed in Attachment A hereto. These sites were conveyed by the County of Westchester to the City of Yonkers between 1962 and 1965. These sites were originally transferred to the City of Yonkers for park or recreational purposes with the provision that, should they be used for other municipal purposes, the county's consent would be required.

"In compliance with the housing remedy order entered in United States and Yonkers Branch NAACP v. City of Yonkers, et al., 62-6761 (LBS), the City would like to use these sites. As noted in the attached, the portions of these sites hereby being requested have never been dedicated for park land nor been improved or developed for park land."

Your Honor, the letter then goes on -- I don't have the text in front of me -- to include the next three paragraphs, changing in the first paragraph the word "obtaining" to "seeking".

THE COURT: Yes.

MR. SUSSMAN: And that occurred twice.

THE COURT: Yes.

MR. SUSSMAN: After the last paragraph as it now appears, the following is added:

"Finally, this request is consistent with the county's policy and adopted plan to make available county land for the development of affordable housing."

The City noted in the conference we held two objections. One, they wanted to include with the letter Resolution No. 141, and the consensus, apart from the City at least, was that since 140 requests all sites, including the two requests in 141, it would be appropriate simply to refer to 140.

And the second issue is whether, as the signatory of the letter, Mr. Hashmall is satisfied that the county indeed has adopted a plan regarding the making available of county land and he and Mr. Newman are going to check that, I assume as soon as possible. And language, appropriate language will be fashioned to reflect whether the county has an actual adopted plan or a policy articulated by the County Executive and others.

But with those two reservations, we have agreed on the language.

THE COURT: You incorporated by reference the paragraph as to which now the board's adoption of this resolution is vital and you put it on the agenda for the next available meeting? That is included?

MR. SUSSMAN: Yes, it is, your Honor.

THE COURT: All right.

With respect to 141, the language in 141 about "The potentially devastating effect that widespread housing

development would have on the east side of Yonkers" is hardly language which is consistent with the overall request, and obviously 141 has already been submitted to the county.

We can't take it back. But it seems to me that its further inclusion in this letter would be inappropriate.

And the second issue -- I'm not sure -- is whether the county has a plan? I missed that.

MR. SUSSMAN: Mr. Newman, your Honor, just briefly had indicated that it would be important to remind the county in such a letter that they do have a plan and a policy in effect to make county land available for such purposes. And he felt that--

THE COURT: Is there any doubt about that?

MR. SUSSMAN: There is a doubt as to whether there is an officially-adopted plan.

MR. SCULNICK: The question is whether it was promulgated by the County Executive or adopted by the Board of Legislators.

THE COURT: I don't want to hold this letter up.

MR. NEWMAN: I am told that is a county housing plan.

MR. SUSSMAN: There is one. But he wants to see it, your Honor. And there was a decision made that there would be a call made to the county --

THE COURT: I think that this letter -- it is 11 -- should certainly be in Mr. Brady's hands by three o'clock today at the latest.

Any problem with that?

MR. SCULNICK: Just as soon as we can get a transcript.

THE COURT: What do you need a transcript for? Of the letter? I thought this was handwritten.

MR. SCULNICK: It is handwritten.

THE COURT: Somebody has to go and type it up. Why do you have to wait for a transcript? There was a day when people practiced law with pen and ink.

MR. SCULNICK: I guess we are all used to word processing.

THE COURT: What I want you to get used to in Yonkers is expedition.

MR. SUSSMAN: If I could have a copy back of the resolution given to you, I will provide a text of this in a few minutes, a legible text of this.

THE COURT: All right. I want to take up two other matters, and that is, Mr. Newman, I gave you my only copy of two letters received -- a letter received from HUD which says, in essence, "Don't waste any more time on the School 30 site because of the topography."

Have you had an opportunity to read that letter?

MR. NEWMAN: Yes, I have.

I take exception to HUD's determinations on both sites, your Honor. It looks to me, from their

Minutes of District Court Proceedings (Sand, J., January 19, 1988)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

January 19, 1988
10:00 a.m.

Before:

Hon. Leonard B. Sand, District Judge

Appearances:

Michael H. Sussman
Brian Heffernan
Manuel Vargas
Michael W. Sculnick
Edwin E. McAmis
John H. Dudley, Jr.
Raymond LaRizza
Richard R. Rowley

(2) The Court: By virtue of the random assignment of courtrooms we meet this morning in the courtroom most recently occupied by Judge Edward Weinfeld, who passed away this weekend. One does not lightly enter a courtroom so filled with memories of that great man or sit in the seat he so recently occupied without remembering the marvel he was.

I first had the privilege to come to know Judge Weinfeld some 35 years ago when I served as a law clerk in this building for another distinguished federal jurist, then District Judge Irving R. Kaufman. Even then, 35 years ago, Judge Weinfeld was a well respected and admired judge. In the ensuing years his reputation deservedly grew and was enhanced. Everyone who had the privilege of knowing and working with Judge Weinfeld grew to love him, and, as strong as our love for him was, was his love and respect for this court. No one was more devoted to the work and the traditions of this court than Edward Weinfeld, and he set an inspiring example for us all. He is very much with us this morning.

We will adjourn these proceedings at 11:30 this morning to enable attendance at Judge Weinfeld's funeral. Whether we reconvene at 3:00 this afternoon or some other date will depend on the events of this morning. The court has cleared its docket for the entire week, and we will sit as often and as long as it is productive for us to do so.

In this court's order of December 15, 1987, setting this conference, the court wrote: "The mayor and members of the city council of Yonkers are requested but not directed to attend this conference."

May I ask Mr. Sculnick, are they in attendance?

Mr. Sculnick: Yes, you Honor. I would like to introduce to the court Mayor Wasisko, Nicholas Longo, Mr. Fagan—the remaining four members are caught in traffic. They are on the way. The city manager is also caught in traffic, Neal Deluca.

The Court: Very well. I appreciate their attendance or planned attendance at this session.

Mr. McAmis: Your Honor, would this be an appropriate time for me to introduce myself? I am Edmond McAmis of the Skadden Arps firm and we are here, along with Mr. Sculnick, representing the city. This is our first appearance of the firm in

the case. With me is Professor Charles Haar of Harvard Law School. He is consultant to our firm, our Boston office. Also present are my young colleague Mark Scnabel, and our partner Judge William Mulligan expected to be here this morning but is laid up with a bad back and asks to be excused.

The Court: Certainly. In the court's order of December 15, 1987 I indicated that at this conference: "The (4) court will call upon the representatives of Yonkers to advise what affirmative actions if any Yonkers is taking or planning to take to implement the housing remedy order."

I think that the best way to approach that is at the beginning, although it is not easy, given the long history of conditions in Yonkers, and of these proceedings, to determine exactly where the beginning point is. But I think it is most appropriate that we begin with the Housing Assistance Plan, commonly referred to as HAP.

So my first question to the representatives of the city of Yonkers is whether Yonkers has adopted a Housing Assistance Plan. I remind the parties that in this court's written order of July 1, 1987, the court provided in paragraph 14:

"On or before July 9, 1987"—I am not misspeaking. "On or before July 9, 1987, the city shall adopt and submit to HUD, with copies to the court and the parties, a Housing Assistance Plan, a HAP, for its Year 13 Community Block Development Grant Application. The HAP shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well defined prior commitments undertaken and the terms of the housing remedy order."

Has the City of Yonkers adopted a Housing Assistance Plan pursuant to that order?

(5) Mr. McAmis: Your Honor, if I may address that question—

The Court: First by answering yes or no and then you may elaborate.

Mr. McAmis: Yes.

The Court: It has adopted a Housing Assistance Plan consistent with that order?

Mr. McAmis: I am advised by Mr. Sculnick that that was for the second year of the three-year program that was set up in the 1986 housing remedy order.

The Court: Has the City of Yonkers, by action of its city council, adopted a Housing Assistance Plan in compliance with the commitment it undertook first in 1980 with respect to 100 units, and then in 1981 with respect to 200 units?

Just so there is no ambiguity, Mr. Kenneally, will you distribute copies of this letter to the parties and to those seated in the jury box.

Is your answer yes, that the city council has done that?

Mr. McAmis: The fact is, your Honor, the city council adopted a second year. What remains outstanding and to be done is the third year of this three-year program.

The Court: Do you have a copy of what it is that the city council did, as provided by that order, that (6) you can furnish to the court and the parties?

Mr. Sculnick: Your Honor, in accordance with the July 1 order, the city council adopted resolution 140 of year 1987, which attached a second-year increment of the HAP. That was adopted on July 7, 1987 in direct response to the July 1 order. As Mr. McAmis is now indicating, the issue that is now present is the third year increment to the HAP which was due, I think, about at the end of October. So it is a new HAP that we are now talking about, not the HAP that was a response to your July 1 order.

The Court: Is there now, at this moment, in effect by adoption by the city council of Yonkers a Housing Assistance Plan in compliance with the commitment undertaken in the document dated July 9, 1981, which has just been distributed and which was entered as an exhibit during the liability hearing, consistent with the court's order?

Mr. Sculnick: Yes, your Honor. There are in effect the 200 units of public housing, if that is your question. There is no HAP in effect in the third year increment of the 1985 through '88 HAP that was entered by this court's order in June of 1986. There is no impediment to the 200 units, your Honor. If that is your question, there has been no HAP that has been adopted by the council, which is the third year of the three-year happen.

(7) The Court: Mr. LaRizza, is HUD satisfied that the city council of Yonkers, as of this moment, has adopted a current effective HAP?

Mr. LaRizza: Your Honor, I am not sure that I can respond to that. If the question is has the city taken the steps necessary to prepare for the 200 units, if that is included in the three-year goal then it would appear that they are in compliance. To ask whether or not they are now qualified for all the other funding, I really can't answer that question. I have had no notice and I haven't had an opportunity to check with HUD to determine that.

(8) The Court: July 1, 1987 was the date of this order, and it was the understanding then of all parties as reflected in this order and the events which preceded this order that the City Council had not adopted such a HAP. I can take judicial notice of the fact that there have been two occasions subsequent to July 1, 1987 when the matter came before the City Council and no affirmative action was taken.

What has transpired since July 1, 1987, Mr. Sussman?

Mr. Sussman: Yes, Judge. As Mr. Sculnick, I believe, indicated, your Honor, the deadline for the adoption of the third-year HAP is October, October 1. The City Council in December at Mr. Oxman's initiative twice considered and twice tabled for apparently lack of votes the third-year HAP which is should have been adopted and and now be in effect. It has not been adopted. It is not in effect.

Without getting into any other issue, I believe there are letters in the files but I didn't bring them here today and I can't make them part of the court's record, that the city has specifically requested a delay or delays in adopting that; and we stand today without it being adopted for at least three months after its timeliness, and I don't really understand the claim that it has been. It (9) hasn't been, and everyone knows it hasn't been.

I am sort of stunned that we are debating a factual matter which I think we have all been dealing with in recent weeks with knowledge that it has not been properly adopted. I don't understand what claims are being advanced to the contrary.

Mr. McAmis: Your Honor could I comment?

The Court: I know it is an easy to resolve because if there is any ambiguity at all, then the City Council can reconvene, and the City Council can very clearly unabmiguously confirm its intent and commitment to construct 200 units of publicly assisted housing in East Yonkers.

You will note in the document that has just been distributed that in July 1981, as a condition to the receipt of federal funds, it was stated in the first sentence on page 3:

"The city is required to take all actions within its control to provide for the construction of 200 newly created units of new or substantially rehabilitated rental housing."

This was the prior year's HAP that dealt with 100 units. Pursuant to that understanding and commitment, during the period 1980 to 1984, the City of Yonkers received $19,760,000 in federal funds, in addition to which, (10) there has been accrued but not yet released to Yonkers because of conditions which bring us to court this morning the sum of $10,184,000.

I am under the impression and belief that there is no HAP in effect in Yonkers. One should resist the temptation to say that Yonkers is in a HAP-less state, but that is my impression and belief, and if that is erroneous, it is a rather simple matter for the City Council to convene itself in a special session as soon as the rules and regulations of the City Council permit, and I understand that, to permit a meeting of City Council, and either adopt, as I believe has not been adopted, adopt the HAP or take other action in compliance with the directive.

Mr. Sussman?

Mr. Sussman: Judge, I just think that the record should be clear, Mr. Sculnick indicated the three-year period '85 to '88, '85-86,'86-87,'87-88. It's the last year, it's our understanding, there is no effective HAP, just so that we understand what we are talking about. There is a HAP under the conditions that you earlier alluded to, the order of the court—

The Court: There has been a HAP passed every year until this year.

Mr. Sussman: No, two of them were deemed passed by action of the court because the city did not comply, but (11) we are not talking about that history. I am not. I am trying to focus on the '87-88 year, which is the current federal fiscal

year. There is no HAP, to my knowledge, for that year. That is the third segment that's being discussed.

If there is some contrary knowledge, I certainly have never seen a resolution for that fiscal year, and I think that is what the court is addressing.

The Court: I am addressing it. Let me indicate why I am addressing it—I will hear you in due course—and I addressed it in the July order:

There are two techniques by which the court can proceed. It can proceed by deeming things to have been done which it was the obligation in the first instance of Yonkers to do, or it can order Yonkers to do those things.

There are limits and disadvantages to the practice of deeming things to have been done. One cannot deem housing to have been built. The building of housing is a complex matter which requires a multitude of proceedings and actions.

The court views the adoption of a HAP, understanding that the obligation to have a current HAP and to build the 200 units of housing goes back to 1980 and 1981, independently of this lawsuit, and understanding that $30 million is involved in that, as having some serious but (12) symbolic value. The City of Yonkers and its elected representatives and all others who speak for Yonkers simply have to come to grips with the fact that there is a commitment on the part of Yonkers to build 200 units of housing in East Yonkers; that a federal court has ordered them to do so, that stay applications were denied by this court, the Court of Appeals, and the full Supreme Court of the United States; that subsequent to that time the Court of Appeals has spoken in an opinion which I believe all students of this court will believe is a unique opinion.

Let me read just one paragraph from that opinion. After summarizing the examples of segregative action and intent, the Court of Appeals wrote:

"Neither this summary nor our more detailed summary in an earlier part of this opinion recounts all of the evidence that supports the district court's finding that the city's housing decisions were intentionally segregative. Given even that fraction of the proof recited here as to the impact of the city's decisions, the sequence of events, the procedural deviations, the conven-

ient disregard of substantive standards, and the explicit and veiled statements of racial concern, we regard as frivolous the city's contention that the evidence is insufficient to support the district court's finding that the city made its subsidized housing decisions with a segregative purpose."

(13) For months this court has heard two excuses advanced for inaction on the part of the city. The first was the unique circumstance of a City Council which was going to be contracted in size with the consequence that City Council persons were running against each other. That event is now past.

The second circumstance was that the case was on appeal. That circumstance is now past.

The court directs that no later than this Thursday, January 21, 1988, the City Council of Yonkers adopt a HAP for the year in question which, in the terms of the order of the court of July 1, 1987, shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well-defined prior commitments, undertakings, and the terms of the housing remedy order.

The time has come—let me speak colloquially—the time has come for an end to the game-playing. Everyone in this courtroom knows what is meant by the adoption of that HAP, and what its terms and provisions should be; but let me say further, to regard the HAP and the passage of a HAP as being a statement by all who speak for Yonkers, that there is an acceptance of the obligation to comply with the orders of a federal court; and that with that goes a good-faith cooperation and participation in the (14) process of implementing the housing remedy order.

If there is no intent to do that, then don't pass the HAP and suffer the consequences, and I will make those consequences very clear. But let's not engage in hypocritical game-playing. There is a moment of truth for Yonkers. Yonkers will comply with the housing remedy order or it will be in contempt, it will be in bankruptcy; the Emergency Financial Control Board, a representative of which I understand is present this morning, will take those actions which are appropriate and necessary for that body to take; appropriate notice will be given to the governor of the State of New York to take such actions as are appro-

priate when a city is in contempt and on the verge of bankruptcy.

The issues transcend Yonkers. They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails. The issues before this court this morning are no less significant than that.

Pursuant to the court's order of July 1, 1987, as amended by this oral direction, unless the City Council adopts that HAP, the substance of which we have already (15) discussed, by 4:30 on Thursday, it will be in contempt of court.

Please put your hand down, sir. I will call on you when it is appropriate.

Unless such a HAP is adopted by 4:30 on Thursday, the fines set forth in Paragraph 16 of the court's order of July 1, 1987 will be due and payable, which means that commencing this Thursday, Yonkers will be in contempt and shall be fined at a daily rate pursuant to the following formula:

(a) $100 for the first day of noncompliance after entry of a finding contempt and notice.

That is taking place now.

The daily rate shall be doubled for each consecutive day of noncompliance. Said fine shall be payable by a check drawn to the Clerk, Southern District of New York, and the City Manager shall cause said check to be delivered to the Clerk of the court by 4:30 p.m. on each day that the Clerk's office is open, representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on which the Clerk's office was not open.

The proceeds of said check—please listen and understand this carefully—the proceeds of said check (16) shall be paid into the Treasury of the United States for general purposes, and shall not be earmarked, escrowed, or otherwise allocated

for any special purpose or fund. The amount of funds previously paid shall not be refundable.

Understand that once those fines are paid, unless an appellate court sets them aside, there is no way short of an act of Congress that the City of Yonkers will recover those moneys.

I am sure many in Yonkers have done their arithmetic, and I am sure the Emergency Financial Control Board has done the arithmetic and knows the precise point at which Yonkers will be bankrupt.

The court directs, as it did in July but I understand the direction is not really necessary because there is a representative of the Emergency Financial Control Board present, that that body be apprised of this court's order, and of the potential for Yonkers being bankrupt in a matter of weeks.

I say again to Yonkers, here is the issue in a clear and simple form. It does not deal with any details or niceties with respect to particular sites. It deals with the overall commitment to comply with the orders of the court, and if the Yonkers City Council is not prepared to do that, don't pass the HAP and you will by the process which I have indicated discover that the construction of (17) the housing will go forward but it will go forward under the most expensive, the most divisive, conditions possible.

Mr. Sculnick, is the order and direction of the court understood?

Mr. McAmis: Quite clear, your Honor.

The Court: Yes. Thank you.

Mr. McAmis: May I address the court?

The Court: Yes. I just want to make sure, is there anyone to whom that order is addressed, any representative of the City Council or the City Manager or anyone else, who has any doubts or fails to understand what it is that the court has directed in open court and in their presence?

Sir, You wish to be heard?

Mr. McAmis: Your Honor, if it may please the court, this is a matter, this HAP is one of several matters that I have had discussions about in the last couple of days with Mr. Sussman and Mr. Heffernan. I believe that we have a solution. It has been discussed, however, in the context of a wider-ranging dis-

cussion in which we have endeavored to determine whether there is any way in which this housing remedy order can be complied with.

The Court: I am aware, if I may interrupt you, I am aware that there have been some such discussions, and indeed, I granted with enthusiasm the request that was made (18) for an adjournment of this hearing, which was originally scheduled for January 11, to permit those talks to go forward, and I had hoped that this morning's conference would be a conference in which one addressed the process of healing the wounds, stopping the hemorrhaging of funds which results from this litigation; and I am distressed that that has not taken place.

Certainly I recognize, I think everyone in this courtroom recognizes, that a consensual resolution to this is preferable to the type of confrontational order which has typified these proceedings thus far, and the reason why I focused on the HAP, I have stated, I think it involves a commitment; and unless and until Yonkers is prepared to say, "We recognize that that is our obligation," then the rest becomes just details.

I also recognize one other thing. Let me say it and then I will permit you to make your statement:

This court is acutely aware of the consequences of an order such as the order that I have just entered on the entire community of Yonkers. I received submissions some months ago in which concern was expressed about the bond rating given by Standard & Poor's and Moody's to the City of Yonkers.

If the gentlemen and ladies who are involved in municipal financing pick up their papers tomorrow and learn (19) how close Yonkers is to bankruptcy, the consequences of that, I think, are very clear.

Also, I think everyone in this courtroom is cognizant of the fact that if the economy of Yonkers is depressed, for whatever reason, those who will suffer first and most are the members of the class on whose behalf this action was taken.

We are going to recess at 11:30 this morning. The court is glad to make available to the members of the City Council and to their attorneys and anyone else a caucus room. I recognize that formal meetings of the City Council have to take place on certain notice, and I believe in Yonkers.

If you wish to come back later today and say that you have caucused with the City Council and there is a firm commitment on the part of a majority of the City Council to adopt the HAP and to express to the court and to the parties the intention of the City of Yonkers to comply in good faith with the obligations to implement the housing remedy order, then that cloud that hangs over Yonkers can be lifted, and then we can address what other affirmative actions Yonkers will take or will not take to implement the order.

There are a multitude of specific actions which Yonkers can take, and if you wish to do that, fine. I will (20) welcome that.

Mr. McAmis: Your Honor, it is exactly in an effort to bring this litigation to a conclusion, this painful litigation to a conclusion, and to do it in a way other than a way that is the most expensive and most divisive, that we have had these discussions to which I referred earlier.

The Court: Can you just in broad terms tell me what the status of those discussions is?

Mr. McAmis: In a sentence, we have had discussions during this last week, and I have had other meetings, caucuses with the City Council, and we have discussed a range of issues. We believe that progress has been made.

Do we have a settlement at this point? No, but it is my position on behalf of the city that there has been enough movement and enough progress here that these discussions should be allowed to go on for a brief additional time to see whether we can come to a conclusion.

The Court: Do you represent to the court, based on the advice which you have received from your clients, that those discussions are going forward in good faith, not merely as a dilatory ploy, and with the intent and commitment that as a result of those discussions a consent housing remedy order will be submitted to the court?

(21) Mr. McAmis: I certainly can represent absolutely that these discussions are going on in good faith. That is what I am—

The Court: I make a sharp distinction—I am sure you are aware that I phrased my question carefully—I am not in any sense questioning the good faith of counsel, but there are re-

ports abroad that groups in Yonkers have been assured that this is simply a holding action to gain more time. More time against what? I don't want to usurp the role of counsel for Yonkers, but I think a fair assessment of the consequences of the tone and substance of the Court of Appeals' decision is that compliance with the housing remedy order is an inevitability for Yonkers.

Would you like to recess until 3 o'clock this afternoon?

Mr. McAmis: Well, your Honor, on that point, let me just respond. I think that there is a new spirit. The new young mayor of Yonkers said at his inauguration address publicly, "This mayor obeys the law."

The Court: I welcome that remark.

Mr. McAmis: Also, I have attended numerous City Council meetings since our firm was retained, by which I mean caucuses generally, and I have found the majority on the Council to be cooperative in this effort, and they have indicated that they want this effort to be undertaken.

(22) The Court: Recess. Let's recess. Caucus, come back and tell me that a majority of the members of the City Council have authorized you to state unequivocally that the City of Yonkers is committed to a good-faith implementation of the housing remedy order, that the City of Yonkers in good faith wants to discuss the specifics of the timetable for implementing that. We can do that in a matter of hours.

Mr. McAmis: Your Honor, as in any other negotiation, it doesn't seem to me well thought out to have the specific terms talked about in a public courtroom.

The Court: I am not suggesting that. I am suggesting that there is one thing which is simple and is clear, and that is the HAP and the commitment. And frankly, in all candor, unless and until the City of Yonkers says to the court, "There is a new spirit in Yonkers, a spirit which is not of obfuscation and delay, but of compliance and good-faith commitment," then the input of the City of Yonkers has to be taken in the context of the absence of such a commitment.

Gentlemen, I see your hands. I know you wish to be heard.

Mr. McAmis: Your Honor, the City Council has assured me that they do wish to proceed to try to work something out.

The Court: When do you wish this court to (23) reconvene?

Mr. McAmis: Judge, I think the parties would be willing to talk to the court in chambers if you want to know what these negotiations are about. There are no secrets from the court. But I don't see that it's going to be fruitful to come back to a public courtroom until we have a deal.

The Court: But you see, there is no deal with respect to the HAP. There is no deal with respect to the 200 units. I will not agree to any compromise or settlement which in any way dilutes the obligation of the City of Yonkers to build those 200 units of housing. I am certainly prepared to consider and to discuss with the parties any consentual resolution with respect to the long-term housing plan; but the parties shouldn't deceive themselves. The commitment for that 200 units is a longstanding commitment, as evidenced by the document distributed this morning, for which Yonkers received all those sums of money.

Apropos of which I have a further order and direction:

The court hereby orders and directs that the $19,760,000 heretofore received by the City of Yonkers in federal funds pursuant to the agreements and commitments with HUD shall be deemed to be held in trust by the City of (24) Yonkers for the purposes of implementing its commitment with respect to the housing remedy order.

Mr. Heffernan, would you on behalf of the court, do the preliminary work necessary for the opening of an escrow account to hold so much or all, if necessary, of the $19,760,000 in federal funds which the court has deemed Yonkers to hold in trust. Disbursements from that fund are to be made only pursuant to a written order of this court.

This court reserves the right at any time to require the City of Yonkers to fund that trust, that is, to deposit in that account cash or liquid marketable securities in the amount of $19,760,000, and to authorize the expenditure from that account of such funds if any as shall be necessary to implement the housing remedy order.

One other matter, and that is, unless and until these proceedings are resolved, Yonkers is in a state of crisis. It is tottering on the brink of bankruptcy. It is tottering on the brink of having its elected officials replaced by appointed officials. Given

that posture, I would like to request but if necessary I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this court pending a resolution of this issue.

Is that understood by all?

Mr. McAmis: Perfectly clear, your Honor.

(25) The Court: Yes.

Mr. McAmis: In view of your direction, and in view of the way this proceeding has gone this morning, may we convene as you suggest privately, that is, the City Council, the mayor and I, and may we then report back to you at a convenient hour this afternoon?

The Court: 3 o'clock this afternoon?

Mr. McAmis: Very well.

The Court: We are adjourned until 3 o'clock this afternoon. Court is adjourned until 3 o'clock this afternoon.

(26) Afternoon Session

3:40 p.m.

The Court: Mr. McAmis, during the period of the recess have you had an opportunity to confer with your clients?

Mr. McAmis: Yes, your Honor. At the direction of the court and when the adjournment took place, I have met with the new mayor of Yonkers and with those city councilmen who are in court today, who are a majority of the entire council. I am authorized to represent to the court that, in the first place, a meeting of the council will take place at 5:00 tomorrow afternoon, Wednesday afternoon, that the appropriate calls for that meeting have gone out. I point out, incidentally, that that is as soon as Yonkers could meet under its rules, the Yonkers council.

Those council members who are here today have authorized me to state that they will support at that meeting a resolution that will put in place a currently effective HAP acceptable to HUD which will reaffirm the commitment of Yonkers to accept funds to build the 200 units of public housing that the court has discussed this morning and required.

The Court: Those persons whom you conferred with constitute a majority of the council?

Mr. McAmis: They do, your Honor.

(28) In addition, your Honor, as I have indicated, discussions have been taking place which are looking to, and hopefully will result in, a resolution of the housing side of this case by consensual agreement. By that I mean, we have had discussions with respect to both the siting and density of the 200 units of public housing, and we are also discussing a plan relating to the long-term aspects of the housing remedy order. I believe that these discussions should be continued, and in order to allow them to be continued and concluded I would make an application that the court adjourn this matter and reconvene at 10:00 on Monday for that purpose.

The Court: What is the position of the Department of Justice?

Mr. Heffernan: Your Honor, the Department of Justice is amenable to an adjournment until 10:00 on Monday to explore the possibilities of a settle.

The Court: What is the position of the NAACP?

Mr. Sussman: The NAACP believes that the time will be well spent and that there will be a possibility by Monday of a settlement between the city and the clients we represent.

The Court: Is there any party who objects to the adjournment?

(28) I will adjourn all proceedings in this case until Monday at 10:00 a.m. I am not certain whether we will be in this courtroom or some other courtroom on Monday, but there will be a notice posted.

I want there to be prepared and submitted to the court, on notice to the parties, prior to 10:00 a.m. on Monday an order which in the absence of a consensual agreement will represent, hopefully, the joint views of the Department of Justice, the NAACP and HUD, with respect to the designation of sites, the unit capacities, the unit allocations, the date for the issuance of requests or proposals with respect to those sites, and any other matters necessary to move implementation of the housing remedy order forward, so that the court will be in a position on Monday either to be advised of the existence of a consensual resolution, and at least the substance if not the specific details

of that consensual resolution, or to execute an order which will move this forward.

I grant any adjournments with great reluctance. I think the parties are fully aware of the fact that I will not countenance delay for the sake of delay. But I would certainly think that an adjournment of a week is appropriate if in fact there is a good-faith basis for believing that that interval of time will enable a consensual resolution of this matter.

(29) There are a number of other matters, including various requests for the lifting of stays. Is there any objection to the lifting of the stay, if indeed there was a stay, with respect to the proposed progressive development applications? Anyone object to the lifting of that stay?

Mr. Sussman: Your Honor, is that Dr. Malik's application?

The Court: Yes.

Mr. Sussman: No objection by the NAACP.

A Voice: Preservation Development Corporation, your Honor.

Mr. Heffernan: The United States has no objection, your Honor.

The Court: I am not certain that that development was ever encompassed within the stay, but in any event that stay is lifted.

With respect to all the other applications for the lifting of the stay, those motions are adjourned until Monday at 10:00 a.m.

On a different subject matter, dealing with the school aspects of the case, is there a desire for oral argument with respect to Dr. Pastor's most recent recommendation? Is there a desire for oral argument on that?

Mr. Sussman: None by the NAACP, your Honor. I (30) don't believe it is necessary.

Mr. Dudley: None by the school board, your Honor.

Mr. McAmis: Could I reserve on that until Monday, your Honor? I just need some time to consult the appropriate people.

The Court: Please advise the court of that on Monday and I will either set a date for a hearing or I will take the matter under submission.

Mr. Sussman: For a hearing or oral argument?

The Court: I don't believe an evidentiary hearing. It would simply be oral argument.

Are there any other matters that should appropriately be addressed this afternoon? Anyone else who wishes to be heard?

Mr. Odom, how much time do you wish?

Mr. Odom: Only a couple of minutes, your Honor. As a dissident member or activist in the black community, I am here today with other activists from the black community who live in the city of Yonkers and who your remedy directly affects. We have made various attempts to communicate our desires to the NAACP and our dissatisfaction with the way they have handled this case until this point. We have been unable to communicate with these people because they have held meetings where they (31) took no new business and would not allow us to present our case to them. On other occasions they have had the police department escort us out of the building.

The Court: What is your application to this court?

Mr. Odom: We are asking, your Honor, that you withhold any decision as to housing in the city of Yonkers until we, as the members of the black community, are allowed to have some input into our fate. Your decision in this court affects us and our children. Our children are bussed against their will and we stand a chance of losing our community by simply transferring poor people to the white community from the west side of Yonkers.

The Court: You may submit to me in writing any matters which you believe should be brought to my attention. Please do so by 4:30 on Friday so that I will have had an opportunity to read it prior to the Monday hearing.

Mr. Odom: We have hired an attorney, Conrad Lind, your Honor. Would it be permissible for him to submit this on our behalf?

The Court: Certainly. Understand that I am not conferring standing or intervention. I am simply assuring you and those you represent that if I receive by 4:30 on Friday anything that you wish me to consider, I will have read it and considered it prior to Monday.

Sir, would you state your name and who you represent and how much time you wish.

Mr. LeBoeuf: Just a few minutes, not even a few minutes. My name is Clayton LeBoeuf, sir, and I am in Yonkers 40 some years. I am president of the Afro-American Citizens Association.

The Court: Is that an organization—

Mr. LeBoeuf: Yes, for 12 years, chartered by (34) the State of New York.

The Court: Is that the same organization that Mr. Odom is associated with?

Mr. LeBoeuf: No, sir, it is not. We have heard of a lot of dollars being spent in the names of black people that this case affects, directly affects, and we talked about up until the present time, your Honor, $30 million spent

The Court: What is your application to the court?

Mr. LeBoeuf: My application is that I am asking you, and I picking a gentleman that I do not even know him, to ask you for any disbursement of money in the name of NAACP or anyone else, that we understand where this money is going. I am not speaking in terms of Mr. Newman and the six people that made 60 million. I am saying that you have made a statement that the court approved that these people be paid, because the NAACP has spent a lot of money. We are saying that the national grant says that they are to receive this money—

The Court: Tell me, what is it that you want the court to do?

Mr. LeBoeuf: We want the City of Yonkers not to pay any legal fees until such time as we the people, who the money was spent against their better judgment, to put (35) that money in escrow just like you did the 19 million until you decide who is to get the money.

The Court: That application is denied.

Mr. LeBoeuf: I thought it would be but I wanted it to be on the record. Thank you.

The Court: Let me clarify the matter. I made a fee allowance to the counsel who appeared in this case and the parties who appeared in this case. If there is any internal dispute as to allocation of funds within the NAACP, that is a matter which

(32) Mr. Sussman: Judge, would you direct that a copy of this be submitted to counsel for the last?

Mr. LeBoeuf: He just interrupted like that. How does he—

The Court: Be quiet, please. I am running these proceedings.

Mr. LeBoeuf: I am sorry.

Mr. Sussman: Could I please ask that any such submission be provided to counsel so it can be understood what the complaints are?

The Court: Yes. Anything else?

Mr. Odom: Thank you very much, your Honor. This is the first time we have had justice in this entire lawsuit.

Mr. Dudley: Judge, I have one miscellaneous matter. I know Mr. Sussman has filed a supplemental application for attorneys' fees. On behalf of the board I want to make it clear that we do not oppose that application. We find the application to be reasonable, both as to the hourly rate and as to the hours claimed. The only reason I rise at all is that I am somewhat concerned with the mechanics of payment, both with respect to that submission when an order is entered and with respect to the order that has been entered on Mr. Sussman's original application. The board and its budget do not have a reserve for claims of this kind. In the (33) ordinary course of business we submit claims or judgements such as this to the city, to be paid from the city's budget, and we would anticipate doing that in this instance. I just wanted to make that clear because we are not objecting as such to the reasonableness of the application.

The Court: On the subject of fees, has the City of Yonkers made payment to the outside housing adviser as directed by the court?

Mr. Sculnick: It is my understanding that it has, your Honor, yes.

The Court: Mr. Newman, is it your understanding that they have been paid?

Mr. Newman: No, they have not paid the outstanding amount for June, July, August, September. They have paid the November bill but not the outstanding 35,000.

The Court: Prior to the next session of court I assume that that will have been paid.

can be addressed separately and is not a matter with which this court is concerned.

Mr. LeBoeuf: Thank you, your Honor.

The Court: Anything further?

We are adjourned until 10:00 a.m. on Monday, in a courtroom to be designated.

Minutes of District Court Proceedings (Sand, J., January 25, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

v. 80 Civ. 6761 (LBS)

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION, et al., etc.

Defendants.
----------X

January 25, 1988
10:00 a.m.

Before:

HON. LEONARD B. SAND,
District Judge

APPEARANCES

BRIAN HEFFERNAN,
MANUEL VARGAS,
Attorneys for plaintiff

MICHAEL H. SUSSMAN,
Attorneys for Plaintiff-Intervenor

EDWIN MC AMIS,

WILLIAM MULLIGAN,
RICHARD SCULNICK,
Attorneys for City of Yonkers

RAYMOND LA RIZZA,
JOHN W. HEROLD,
Attorneys for Department of Housing and Urban Development.

THE COURT: Good morning.

MR. McAmis?

MR. MC AMIS: Your Honor, may it please the court, one of the most distressful aspects of this vexed and wretched litigation is the threats of violence that it has engendered. After we were before your Honor last week, the members of the City Council who agreed to pass the HAP that your Honor required received an envelope with their names on it at city hall. Each of these envelopes included a bullet.

I have an affidavit from the police commissioner of the City of Yonkers respecting that incident, and also an incident about a threatening call to the daughter of one of the Council members, and a threatening telephone call received by a secretary at city hall.

I have provided copies to the parties. I ask leave to submit this affidavit and make it part of the record in this case.

MR. SUSSMAN: No objection.

MR. HEFFERNAN: No objection, your Honor.

THE COURT: Yes. You may do so.

MR. MC AMIS: Your Honor, that threat, and I am sure it's not the first one, has not cowed the mayor and City

Council of Yonkers, and I am authorized by the mayor and the majority of the members of the City Council to make the following statements to the court:

The mayor and a majority of the City Council are committed to vote for and support the following plan. They intend to have the City Council meeting within 72 hours in order to allow the public to have plenty of time to be there and to know what the terms are, which I am sure will be widely reported.

With respect, your Honor, to the 200 sites --

MR. SUSSMAN: Units.

MR. MC AMIS: Sorry, 200 units of public housing, the city proposes the following. I will read a list of proposed sites. There are seven on my list, and proposed numbers of units on each site:

Whitman School, 40 units; Lincoln School, 48; School 4, 24; Helena -- going now to private sites -- 22; Wrexman/Midland, 30; Clark 20; and Valentine, 16.

Valentine Avenue is land owned by St. Joseph's Seminary, and I understand that the Cardinal is prepared to make a statement welcoming this development.

The City is to have ten days, your Honor, to propose one or two additional sites. It additional sites are not found within that period, these seven would be the sites to be used. If additional sites are found, it would not be proposed to remove any of these seven in the list, but simply to use those additional sites to diminish somewhat the number of units on the seven sites that I have previously mentioned.

THE COURT: But not below a certain level.

MR. MC AMIS: But not below twelve units on any site.

The city proposes and intends that when the time comes there would be one request or proposal for all 200 sites. They would be developed -- I am sorry, I keep saying sites. I mean units. They would be developed as one development.

THE COURT: A means, as I understand it, to enable a single developer to engage in the entire project, thereby effecting economics in many aspects.

MR. MC AMIS: That's correct, your Honor. We understand that there are economies and advantages to the city to be obtained in doing to that way.

With respect to assisted housing, the city proposes to implement the court's long-term plan in the following way:

The city would admit that a goal of 800 units of assisted housing as sought by the government and the NAACP is the goal to be worked toward; and furthermore, that there would be a goal of 200 of these units be constructed in each of the four years after the plan comes into operation.

The city would agree further that within ninety days from entry of a consent decree, which is what we are contemplating, that is, we are contemplating the creation of a consent decree to submit to your Honor, and within ninety days after that is in place, the city would institute a program of incentives designed to encourage private builders to build the assisted housing. This plan of incentives still has to be worked out among the parties.

THE COURT: I understand there is some legislation that is contemplated.

MR. MC AMIS: Yes, your Honor, the city will pass legislation to the effect that until the goal is reached, only assisted and private housing that has an assisted component would be permitted in Yonkers, that is, if the agreement is to put forth housing in the ratio of 80 percent market owned, 20 percent assisted, that all builders who build multi-family units

in Yonkers would be required to build that sort of housing and nothing else until the goal is reached.

The presumption is that this program of incentives will be given a two-year period in which to work. However, if after one year from the time it goes into effect any party believes that the program is not working, and thinks that he can demonstrate that, that party may return to this court for additional relief, and if that party sustains its burden, the court may order additional relief.

The city understands that, among the things the court might do at that time, would be to require the city to make available city-owned land for assisted housing. The remedies would be up to the court, but the city understands that that is a possible remedy. The city would agree to cooperate with the court in that regard at that time.

Lastly, your Honor --

THE COURT: I take it that that encompasses an acknowledgment on the part of the city if that circumstance should come to pass, namely, that the court would be required to take some other action, that the city acknowledges that it would be within the power and jurisdiction of the court to require the use of city-owned land for that purpose?

MR. MC AMIS: That will be a part of the consent decress, your Honor.

Lastly, I just state that the other thing that has been agreed to is that all prior orders of the court remain in effect except as the court may indicate modifications this morning respecting requests for lifting the freeze order.

THE COURT: MR. Heffernan?

MR. HEFFERNAN: Your Honor, the government has considered the proposal put forth by the city, and as

enumerated and set forth by MR. McAmis, we have agreement in principle on the terms as set forth by MR. McAmis.

THE COURT: MR. Sussman?

MR. SUSSMAN: It's a great day, your Honor, and the NAACP, we are very delighted that an agreement has been reached after strenuous negotiation with the city and their counsel, and we would simply request of the court a three-week period in which to formulate and complete the consent decree as it particularly relates to the long-term housing aspects.

We understand that today, and hopefully by the end of today, we can provide the court with the text. It relates specifically to the 200 units. Respecting the Council's desire for 72 hours to hold a public meeting and formally accept the embodiment of the decree, we would like, though, three weeks to finalize the details on the long-term plan; and I believe the parties have negotiated in good faith up to now, and will continue to do that and reach a final agreement dotting all I's and crossing all the T's and submit it to the court.

MR. HEFFERNAN: Your Honor the government would join in MR. Sussman's request to the court.

THE COURT: MR. LaRizza?

MR. LA RIZZA: Your Honor, on behalf of HUD, just a couple of comments.

First, the suggested number of units for the Lincoln site was 48, and I wanted to remind the parties that HUD's preapproval for that site only went to 35 units. I cannot site at this time what sort of information could be presented to HUD that might cause HUD to change its mind, but that is an issue.

THE COURT: In the event that that density for Lincoln becomes a problem for HUD, and in the event that the city did not within the ten-day period designate an additional site, it's

the court's understanding that given seven sites, that that concern of HUD could be alleviated. Do you agree with that?

MR. LA RIZZA: It certainly seems possible, your Honor.

THE COURT: Very well.

MR. LA RIZZA: Secondly, we are currently at HUD thinking of three projects. It will be necessary if we are going to accept the city proposal going with only one RJP to obtain MR. Baugh's approval to reformulate the project. We can start asking him and --

THE COURT: Do you know of any reason why that would not be --

MR. LA RIZZA: I know of no legal impediment, your Honor. There seems to be a disagreement among experts, if you will, as to whether or not that would be the most productive way of producing the housing. There are some who say that there are certain economies of scale which tends to encourage more developers to produce units at a lower price. Others we have spoken to suggest that that is too big a job and --

THE COURT: Obviously, in any project of this nature, there is an optimum magnitude to the project; and what you are telling me is that it has not yet been determined by HUD that a single RFP would be the optimum, but the issue would be one which solely relates to the economies of construction costs.

MR. LA RIZZA: That's right.

THE COURT: It is a technical issue. It is not a conceptual issue, and there is no reason why that should not be able to be resolved within the confines of the nature of the concern.

MR. LA RIZZA: Exactly.

THE COURT: Yes.

MR. LA RIZZA: The only other point, your Honor, is that for preliminary evaluation of the Valentine site, which is also on the list, does indicate that there may be the possibility of doing a historic preservation review for that site, its proximity to the St. Joseph's Seminary. I only mention that because that proved to be one of the items that took considerable time on School 4.

THE COURT: I will have something further to say which I think would alleviate that concern.

MR. SUSSMAN: Judge, could I make one more comment?

MR. DUDLEY: Your Honor, the school board has not at this point in any way indicated its approval of what I understand is a proposed settlement between the city and the United States and the NAACP. To the extent that this proposed consent decree involves the use of school sites, and as MR. McAmis outlined it, it does involve the use of two school sites. The school board will have to consider --

THE COURT: The three school sites.

MR. SUSSMAN: Two. School 4 is no longer -- it is a city site.

THE COURT: Yes, I am sorry. Two sites presently.

MR. DUDLEY: It appears that the proposed consent decreee contemplates the use of Whitman and Lincoln, as I understand it, and the school board will have to consider its position with respect to this, and I just want: to make clear for the record that a consent decree would not be binding on the school board unless and until the school board also indicated its agreement with it.

THE COURT: Yes. I understand the appropriateness of your making that reservation. Let me through you say this to the school board:

There was a time, I believe it was in July, when the parties attempted to achieve a consentual resolution of this vexatious problem, and at that time, in a spirit of compromise and recognizing how desperate was the need of Yonkers for a consentual resolution of these problems, the school board indicated its willingness to cooperate with respect to these housing sites although it objected to any designated sites for reasons which I will indicate later this morning.

I would hope that the school board's attitude will be consistent with its attitude in July, and will recognize the opportunity which is being presented this morning, and will act accordingly.

Is there anyone else who wishes to be heard? MR. Sussman?

MR. SUSSMAN: Just briefly, your Honor. There is a timetable for the acquisition by the city of private sites and the RFP developer. I am not going to go into the specifics, but your Honor should be apprised that we have essentially agreed on that timetable, and it is part of the agreement, as it's important to get the sites and begin the developments.

THE COURT: Do you think it would be helpful to state the substance of that agreement this morning?

MR. MC AMIS: I have no objection. THE COURT: Suppose you do that.

MR. MC AMIS: I know just what MR. Sussman is talking about is the agreement on the private sites on the 200, but he has made application for three weeks, and I think we need at least that long to work out the details that have to be worked out in the long term.

THE COURT: Long term, but suppose you state for the record, MR. Sussman, what the timetable with respect to the private sites is to be embodied in the consent decree which I hope will be submitted to me later today.

MR. SUSSMAN: All right, your Honor.

With the reservation that the government has not yet explicitly agreed on each of these dates, and the City Council, of course, has to approve this within 72 hours, let me just indicate the current draft which we are working on says that on or before 15 days from the date of this decree or of any amended decree which reflects the city's efforts to gain additional sites, the city shall cause to be made fair-market value offers to private owners, so there is a 15-day period from the point the decree is signed to purchase the private sites which had have previously been enumerated, and within a period of 60 days of the date of the decree, the city will either have concluded negotiations with and thereby acquired title from the owners of the private sites, or the city within that same 60 days or at the conclusion of 60 days will commence eminent domain proceedings against the owners of these private sites, those that have been unwilling to voluntarily sell their properties.

It's our understanding that with the commencement of eminent domain, the city in fact has the title over the property under state law.

On or before 60 days from the date of the decree, this is a provision that runs parallel to those I have just referenced, the city shall have prepared or cause to be prepared with the MHA's assistance--

THE COURT: A little slower, please.

MR. SUSSMAN: Excuse me -- the city shall have prepared or cause to be prepared with the MHA's assistance requests for proposals from private developers for the construction of the 200 units of public housing.

After acquiring site control, a provision which should occur within 60 days of the signing as I enumerated earlier, within ten days of that, the city shall publish or cause to be published the RFPs at its expense, and the city has agreed to that publication in journals and periodicals of general circulation as well as of interest to developers. The publication period should be a period of approximately ten days.

There will then be a two-month period, your Honor, in which the various developers may make their proposals. Thereafter, there will be a 30-day period during which the parties, including HUD, the MHA, the city, the Justice Department, and the NAACP will review the proposals in good faith, and in an attempt to come to a conclusion as to which developer, assuming one developer will be responsible for implementing the housing.

Should the parties not be able to agree, which we hope will not occur, of course, that matter will be put to the court for resolution, so in short the winning bid should be determined no later than 100 days after the date on which the RFPs are first published, and we anticipate that the entire process from the date the order is signed should be 170 days, which is approximately six months.

That essentially is the timetable that we have in this draft, which I believe is going to be the outline of the agreement.

THE COURT: Very well. Mr. Lynn, I have before me a motion to intervene as plaintiff filed on behalf of the WE Coalition.

MR. CONRAD J. LYNN: Yes Judge.

THE COURT: I believe, Mr. Lynn, you were not in court last week.

MR. CONRAD J. LYNN: No, I wasn't, your Honor.

THE COURT: And I believe that you have been misinformed as to the advice that the court gave to Mr. Odom. What I stated to Mr. Odom was that I would read and carefully consider any statement made by Mr. Odom or those identified with his position, and if received by me by Friday, I would have read and considered it prior to this morning's proceedings.

The court made explicit, however, that it was not granting a motion to intervene in these proceedfings. A motion to intervene has entirely different considerations and consequences, and it would be entirely disruptive and delaying of these proceedings for the court now to permit additional parties to intervene.

I say this all to you because I knew you were not here last week, and because the document which I have received is a motion to intervene as plaintiffs. This court has denied numerous other motions to intervene made, the court believed, in an untimely fashion, but certainly far earlier than this motion.

MR. CONRAD J. LYNN: Yes, your Honor. I understand that. This is certainly untimely, and of course I was given the information that you would consider the coming into the matter. The number of organizations that are listed, mainly because this is a matter affecting all the citizens of Yonkers, and many of the organizations that I have listed here, feel that they have not had a chance to put any input in.

This matter, as your Honor certainly knows and has had that point of view for a long time, should get as much consent from the people living in Yonkers as possible; and this application is not for the purpose of being adversarial. The purpose is, after so many years of litigation, to see if we cannot get a consensus, and I am not a resident of Yonkers, I don't know how much support each one of these organizations has. They list the Afro American Association, the City Club of Yonkers, Little People Committee for Political Justice, the Tower Society, Save Yonkers Federation, the People's Union,

Yonkers Community Action Program, and the West Side Coalition of Black Concerned Citizens.

Now, it may be that I would imagine that they must include a pretty wide section of all races in the City of Yonkers, and I am aware of the fact that your Honor has refused in the past to let other organizations come into this litigation. However, now we are facing the implementation of an order with which we are basically in agreement.

THE COURT: We have been facing -- this court entered its implementation and remedy order two years ago. For two years everyone in Yonkers has been aware of that.

I understand your position. I repeat again that any submission that these organizations wish to make to me, they may do so. I will read and I will consider them, but I will not permit intervention nor will I delay these proceedings.

Thank you, Mr. Lynn.

MR. LA RIZZA: Your Honor, with respect to the timetable that MR. Sussman outlined, we did detect one impediment. That timetable would call for the publication of the RFPs within ten days after the acquisition of title, but HUD could not give final site approval to the privately owned sites until after the preliminary site report was prepared. That requires a survey, and that requires test borings and I do not think --

THE COURT: Yes. Do it promptly.

MR. LA RIZZA: Your Honor, we can't get on the property until the title of the property passes.

THE COURT: Now, let me say again, I have said this many times in the past. I understand that HUD has routines and it has procedures. I also understand that when there is a great need to move forward with expedition, that can be done,

and if any further order of this court is needed, it will be granted.

Do not be concerned about not having access to the properties. If you need an order to gain access to the properties, you can have such an order.

There comes a time when a certain stance requires that extraordinary efforts be made by everyone, including HUD. That time has come.

MR. LA RISSA: Your Honor, as long as that's understood that what the court is prepared to do is to authorize agents of the Municipal Housing Authority to trespass on private property in order to drill holes in it, then we are satisfied.

THE COURT: Very well.

Anyone else who wishes to be heard?

Mr. Odom, I have heard from your attorney. MR. Spallone you speak -- Mr. Odom will you please be seated and quiet. If not, I will ask the marshals to remove you.

Mr. Spallone, you speak through your counsel.

Sir, you are?

MR. KEVIN GORMAN: I am Keving Gorman. I am president of the Residents Association of the Yonkers. I would merely like to just point out some factual adding of the sites. I don't want to give an opinion --

THE COURT: You may submit that to the city. The city in this proposed order has a period of time in which it may designate additional sites. You may make that input to them.

MR. GORMAN: This has not to do with the additional sites, sir. It has to do with the fact that 180 sites of 200 units

are being placed in an area in the lower third of the east side of Yonkers, and that 68 of them are being placed in one U.S. Census tract neighborhood.

THE COURT: Very well.

MR. Spallone, you may put your hand down, I have noted your hand, and I have stated the reasons why the court does not recognize you.

First, the court wants to thank all counsel and Mr. Newman for their efforts, particularly their efforts since we last met. The parties have labored very diligently. It's been a long and hard effort but an entirely productive one.

The court also wants the members of the City Council to know that it recognizes and appreciates the pressures which have been put upon them, including the threats of violance. This court is not a stranger to such threats, and it is also the case that others in this courtroom have received such threats, but this is a country which lives by a rule of law, not by threats of violence.

There was a time earlier in this litigation when I said to the members of the City Council that no one said being an elected representative was an easy task, and that is certainly true this morning.

A consentual resolution of this controversy is overwhelmingly in the interests of all parties concerned, especially in the interests of the citizens of Yonkers.

Had there been no consent, the court would today have entered an order designating 56 units at Whitman, 48 units at Lincoln, 24 units at School 4, 22 units at Helena, 30 units at the Midland/Wrexham site, and 20 unites at Clark.

School 30 would not have been designated because the court has regarded it as a marginal site for housing. Since the nearby Midland site has surfaced and been designated and is

acceptable to all of the parties, the School 30 site is no longer needed, and its magnificent trees can be spared.

A consentual resolution is important for a number of reasons. This court has not sought an activist role in this litigation. At every step of the proceedings, the court has stayed its hand to enable the elected representatives of Yonkers to have maximum input in shaping the destiny of Yonkers. At times, that role has been abdicated. Happily, today it is being responsibly discharged.

A consentual resolution is needed because, while a court can order bricks and mortar, only the citizens of Yonkers can create an environment which is conducive to good relations among all of its residents. That is the task that lies ahead for all of Yonkers and its leaders.

In this regard, the court was advised this morning that later today his eminence, John Cardinal O'Connor, will be issuing a statement concerning the Valentine site, and it's the St. Joseph's Seminary site. In that statement, the Cardinal will make known the church's intent not only to facilitate the construction of housing on this site but to welcome and aid the tenants who will live there.

The court has been advised that the Cardinal welcomes the opportunity to participate in a tangible demonstration of the church's commitment to social justice. That is very welcome and very helpful.

On the understanding that there will be prepared and submitted to me as soon as possible and in such time as to enable the City Council to act within the 72-hour timetable permitted, the stay heretofore imposed on all private development in Yonkers is lifted; the stay on the disposition of all city-owned land is continued except that the stay as to the city-owned Austin Avenue site is lifted.

Are there any other matters with respect ot housing which anybody wishes to bring to the court's attention?

When the parties were last before me, all parties except the City of Yonkers indicated that it was their wish that the court deal with the pending school matter on the papers submitted without further oral argument.

Has the city reserved on that question? Has the city reached a determination on that matter?

MR. MC AMIS: The city is submitting a brief, your Honor, and we are sure that you will consider that, and so we make no reuqest for oral argument.

THE COURT: Very well. Do you know when that will be received?

MR. SCULNICK: This morning, your Honor.

THE COURT: Is there anything further? There is a hand raised.

MR. GERALD LOEHR: Your Honor, my name is Gerald Loehr. We had submitted on behalf of River Princess Corporation an application for permission to proceed in connection with city-owned property at Trevor Park to which this proposed catering facility is tied and moored. I wonder if, although you have continued that order of July in effect, I wonder if you would grant that application.

THE COURT: I have lifted the stay as to all private development. I have continued the stay as to city-owned land. If there is a further order that is needed in the light of what has happened this morning, would you consult with counsel for the city and see if there can be a joint request, and if not I will entertain your application at an appropriate time.

Anything else?

All right. I hope this morning is the start of a new era of good will in Yonkers, and I thank you all.

Minutes of District Court Proceedings (Sand, J., January 28, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v. 80 Civ. 6761 LBS

CITY OF YONKERS, et al.,

Defendants.

----------X

January 28, 1988
10:00 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

APPEARANCES

MICHAEL H. SUSSMAN
BRIAN HEFFERNAN
MANUEL VARGAS
MICHAEL W. SCULNICK
EDWIN E. McAMIS
JUDGE MULLIGAN
OSCAR NEWMAN

THE COURT: Mr. McAmis.

MR. McAMIS: Your Honor, may it please the court, today my partner, former Judge Mulligan, and I, together with cocounsel, Mr. Sculnick, and opposing counsel representing

the United States of America and the Yonkers branch of the NAACP, Offer to the court for settlement and signature the proposed first remedial consent decree in equity.

This decree is a decree in equity in the technical sense in which lawyers understand and use that word. More importantly, it is a decree in equity in the broad social sense, that it has always been true throughout our history that it is by doing equity that our courts have sought to fulfill the law's promise of justice to all people.

Your honor, the decision by the mayor and council of Yonkers to consent to this decree and thus to end one aspect of this litigation has been a most difficult decision for them. They have considered the advice of their attorneys, they have wrestled with their consciences and with the views of those opposed to any settlement.

Their decision is made at what they perceive to be considerable political cost to themselves. In that respect I hope they are wrong, because in this crisis they have been forged into a group of stand-up leaders whom any community should be proud to have, and who would grace the leadership of any community.

Their decision is also made under the threat of violence to themselves and to their famililes. Nevertheless they consent because they have become persuaded and believe that by doing so they are doing the right thing for the people of Yonkers.

Together with this decree, the leaders of Yonkers submit the hope that their gesture of reconciliation will be received and understood as such by all the citizens of that strife-riven community.

Lastly, your Honor, I can state that the United States Attorney for the Southern District of New York is actively investigating the threats to the mayor and council referred to in the affidavit of Police Commissioner Fernandez filed in this court last Monday, as well as the bomb threat that emptied City

Hall the day before yesterday. Violence in connection with a civil rights matter is a federal offense. I am informed that the United States Attorney has brought in the FBI to pursue this investigation.

THE COURT: Thank you.

Mr. Heffernan.

Mr. Heffernan: Thank you, your Honor. Your Honor, the government is obviously pleased that we have reached a resolution to this at times hostile and at most times frustrating and unpredictable case. I stand here before you today tired, as I am sure most of my colleagues here are. The past couple of weeks have seen a lot of hard work.

I especially applaud the actions of those city officials and members of the city council who have finally decided to deal with this litigation rather than ignoring it or hoping that it goes away. After eight years this litigation has not gone away, and it will not go away tomorrow. But we believe that the document we have handed to the court is a start toward the day when this lawsuit will be a thing of the past and equal housing opportunity will be a reality in Yonkers.

Finally, your Honor, if I can be forgiven a personal note, there have been a few government attorneys who have preceded me this litigation, who have worked a lot longer and a lot harder, in my opinion, than I have. In particular, Sarah Vanderwicken, Josh Bogin and Ken Barnes worked years, to the point where Yonkers was basically their life. They never found themselves, unfortunately, in the situation where I stand today, where all the parties walk into this courtroom in final agreement to resolve this litigation. I know they share the exhileration that I feel and my colleagues here feel today, that we have finally been able to do something positive. I also know that they share a hope for a positive future in Yonkers.

THE COURT: Thank you.

Mr. Sussman.

Incidentally, is there an execution copy of the consent decree?

MR. MCAMIS: Yes, your Honor.

THE COURT: The text is identical to the text I examined?

MR. MCAMIS: Yes, your Honor. I have a request. The decree is dated the 25th. On the consent of the parties, we would request that it be dated today, to run 10 days from today.

MR. SUSSMAN: That is on consent, Judge.

THE COURT: That is on consent, that I will change the date to January 28.

Mr. Sussamn.

MR. SUSSMAN: Thank you, Judge.

Today is a very emotion day for those of us in Yonkers who have been with this case, for some people in the black community, 25, 30 years, myself only seven or eight years. The reason it is an emotional day is because the events of last evening, frankly, were the same events which have so often occurred but there was a different ending, and the difference in ending makes all the difference.

I want to publicly applaud the members of the city council, those groups in east Yonkers who so courageously took the bull by the horns after all these years and supported a constructive settlement to this litigation.

I want to pledge to the council members that the NAACP and responsible black and Hispanic community leadership, myself as their lawyer, will continue to cooperate in every way

possible to insure the effective and reasonable implementation of the decree.

I also want to pledge to them that there will be dialogue should disputes arise, and our desire is to have those disputes resolved within the community context to the extent possible, and not before the federal court.

This lawsuit was spawned by the frustration of the community after years of attempting to use the political process in a constructive manner, efforts which this court has found and affirmed were frustrated.

I want to thank your Honor, because although I have often disagreed with the amount of patience the court has shown, I think in that regard the court's view was the proper one and the fact that we were able to achieve a constructive resolution when it seemed in fact most unlikely, given the turn of political events, really was due to the sequence of events that was in some sense, I am sure, intentionally orchestrated, if I can use that word, by the court.

I also want to thank Mr. McAmis and his colleges at Skadden Arps, as well as Mr. Sculnick. I think in a case of this magnitude, with issues of this level of emotionality, it is remarkable that the attorneys have been able to in a sense become friendly, care about one another as people and not let the rancor of issues degenerate their own personal relationships. I think the same is true with this court and Mr. Newman and of course Dr. Pastor. I think that stands with everyone in good credit.

I want to reiterate that the NAACP leadership is fully and firmly in support of this decree. While there are some dissident voices, that only speaks to the fact that no community is homogeneous and no community has one opinion, nor should anyone view any community as having one opinion. That itself is a certain racist kind of thing.

As I have represented the class in this lawsuit since 1981, I am firmly of the view, having had numerous meetings with my clients, the executive committee of the NAACP, some 30 members and many other responsible voices, that this decree is viewed in a wholly constructive manner. Its terms, hopefully, will be carried out with a minimum of rancor and ridiculous disputation, but rather with good faith.

With that, Judge, I appreciate your tolerance. Thank you.

THE COURT: There have been so many occasions during the seven years of this litigation when I have felt myself compelled to scold and criticize and sometimes to pontificate, that it is very meaningful and pleasurable indeed to have this session of the court and to have these expressions of good will. This is indeed a happy day for all of Yonkers.

Counsel have worked very hard and we all appreciate that, and perhaps counsel are entitled to a respite but others are not. One task is ending with the signing of this order but a tremendous task lies ahead, not so much for lawyers or for the court, but the divided community of Yonkers has to coalesce, and so the mantle perhaps passes to those citizens of influence and of good will in Yonkers to make truly meaningful what we do this morning.

The words of His Eminence John Cardinal O'Connor, in his statement of January 25 appropriately state the attitude which should prevail throughout Yonkers:

"This is to be approached as a unique opportunity, both to design appropriate living conditions for those who have a right to decent housing and to create an attractive and spacious environment in which young and old can live and grow in dignity, comfort and neighborliness."

I am sure everyone in this courtroom anticipates that the responsible leaders in Yonkers -- clergy,educators and others --will coordinate their efforts, working together with the Fair Housing Office which has been established pursuant to earlier

decrees of this court, so that the consequence of this order is to create opportunities for housing which provide not only bricks and mortar but a community and an environment which is healthful and beneficial to all.

Yonkers has a very good example with respect to the schools. I know that the school integration plan has not been perfect and that there are problems. The school board and its counsel aggressively defended the suit. Once there was a remedy order in place, a school integration plan in place, there was a spirit of cooperation and of effort to make it work which I believe is unparalleled, not only at the level of the superintendent of schools and the administrative staff but down to the classrooms and the teachers. The consequence has been that, although not perfect and although there are problems which remain to be addressed, the school integration plan in Yonkers is viewed as being one of the most successful in the country.

The hope is that the same picture will emerge with respect to housing, not only at the level of the mayor and the city council but cooperation down to the building inspectors and all of the other employees, who can assist and facilitate or can delay and hinder.

The anguish of the past seven years and the national attention which has focused on Yonkers gives Yonkers a great opportunity. Everyone will be watching Yonkers, and Yonkers is in a position to show, first and foremost to its own citizens but to the country at large, its sincerity, how the wounds inflicted in the past can be heeled and how Yonkers can move forward to be a community in which all residents enjoy the benefits intended by our Constitution and our federal laws.

I am very pleased to sign the consent order.

Is there any further business?

MR. SUSSMAN: Yes, Judge. As your Honor is aware, this is a class action in part, and it is my view that with respect to that aspect of this first remedial consent decree in equity, which deals with the placement of 200 units and the circumstances therefor, there is no need for any further review with respect to the class because the consent decree contemplated 200 units and I am not sure that the details of how those units are placed are really a matter of need for review by the class.

However, I do think that with respect to the longterm housing plan, which, as the court is aware, is not yet fully completed, there may be a question that the class members should have an opportunity, should they have complaints, for a fairness hearing. I think that, however, it is premature to schedule that hearing or to publish anything because we still have a consent decree to finish, in the next few weeks. So it is my suggestion that we put that matter off and contemplate a hearing to the extent it is felt to be needed, and further research will be done on that in the next few weeks, if that meets the court's approval. I do not think the 200 issue merits that kind of review, although I have no objection to obtaining that review.

THE COURT: Does anybody have a contrary view?

MR. MCAMIS: No, your Honor.

MR. HEFFERNAN: No, your Honor.

THE COURT: I agree that at some point, pursuant to rule 23, consent of the class will be required, but I agree also that this is not the moment. This is an interim step and therefore such a procedure now is not appropriate.

I might view the matter differently were it not for the fact that this is a matter which is well known to the Yonkers community, and those who have contrary views have been given an opportunity to express those views. So we will defer

setting a date for a hearing pursuant to rule 23 but there will at some point be such a hearing.

MR. SUSSMAN: Thank you. Judge

THE COURT: Anything else? I am under the impression that there are only two matters which are pending before me -- this is with respect to the entire litigation -- the matter with respect to the two schools which is now submitted, and I believe Mr. Sussman has a supplemental application with respect to fees. Has there been a response to that application?

MR. SUSSMAN: It has been fully submitted, Judge.

THE COURT: Has the city responded to that matter?

MR. SCULNICK: Yes.

THE COURT: Those are the only items of which I am aware.

Thank you.

First Remedial Consent Decree in Equity, Dated January 28, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATIONS FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Plaintiff-Intervenor,

-against-

YONKERS BOARD OF EDUCATION: CITY OF YONKERS, and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 CIV 6761 (LBS)

----------X

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	Maximum Density
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities," provided that the Maximum Density of no site shall be fewer than 12 units.

---

* If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences

required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no

---

* The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400 and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to

in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledge further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area ; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent

Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap. Dated: January 28, 1988

Plaintiff,
The United States of America

By:/S/_____
Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

Attorneys for Plaintiff
Plaintiff-Intervenor,
Yonkers Branch -- National
Association for the Advancement
of Colored People

By:/S/_____
Michael H. Sussman, Esq.

SUSSMAN & SUSSMAN
30 South Broadway, Suite 418
Yonkers, New York 10701
Attorneys for Plaintiff-
Intervenor Defendants,
The City of Yonkers and
Yonkers Community Development
Agency

By:/S/_____
Michael Sculnick, Esq.

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY
1 Dag Hammarskjold Plaza
New York, New York 10017

By:/S/_____
Edwin E. McAmis, Esq.

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022

Attorneys for Defendants
The City of Yonkers and
Yonkers Community Development
Agency

SO ORDERED:

/S/_____
Leonard B. Sand, U.S.D.J.
Dated: January 28, 1988

Motion by City of Yonkers to Vacate Consent Decree, Dated May 2, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

80 Civ. 6761 (LBS)

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET. AL.,

NOTICE OF MOTION TO VACATE CONSENT DECREE

-against-

YONKERS BOARD OF EDUCATION, CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

PLEASE TAKE NOTICE, that defendants City of Yonkers and Yonkers Community Development Agency, upon the annexed affidavits of Nicholas C. Wasicsko, sworn to May 2, 1988, Nicholas V. Longo, sworn to April 29, 1988, Charles A. Cola, sworn to May 2, 1988, and Edward J. Fagan, Jr., sworn to April 28, 1988, the accompanying Memorandum of Law in Support, and upon all prior proceedings had heretofore, will move this Court on May 12, 1988, at 2:15 p.m., or as soon thereafter as Counsel may be heard, pursuant

to Rule 60(b), F.R.C.P. vacating the Consent Decree entered January 28, 1988.

Dated: May 2, 1988
New York, New York

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By: /s/ Michael W. Sculnick
Michael W. Sculnick
Attorneys for Defendant
City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1981

CO-COUNSEL:

SIDLEY & AUSTIN
Rex E. Lee
Carter G. Phillips
Mark D. Hopson
Gene C. Schaerr
Kevin L. Kimball

1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

80 Civ. 6761 (LBS)

YONKERS BRANCH-NATIONAL, ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET. AL.,

Plaintiff-Intervenors,

-against-

YONKERS BOARD OF EDUCATION, CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

NICHOLAS C. WASICSKO, being duly sworn, deposes and says:

1. I am the Mayor of the City of Yonkers ("the City"), and I served a a City Councilmember during 1986 and 1987. I make this affidavit upon personal knowledge, in support of the City's Motion to Vacate the Consent Decree entered January 28, 1988.

2. During the period late December, 1987, through January 28, 1988, I was actively involved as a member of the City Council and as the Mayor in providing direction to the City's attorneys in the negotiations leading to the Consent Decree. I was present at numerous briefing sessions with the City's attorneys during this period of time, and received frequent telephone calls from the City's attorneys regarding the status of the negotiations.

3. In the days immediately prior to January 25, 1988, I was advised by the City's attorneys that, in the absence of a Consent Decree, the Court intended to enter its own order designating six sites for the development of the 200 units of public housing: Whitman, School 4, Lincoln, Helena, Wrexham, and Clark/Loring.

4. During the days before January 25, I engaged in discussions regarding the use of the Seminary site on Valentine Street for public housing. I held the view that under no circumstances should the City agree to acquire the Seminary site without the express permission of the Archdiocese of New York ("the Church"), the owner of the property. I took this position because I believed that the public support for the use of that site and the Consent Decree as a whole would be critically lacking in the absence of consent from the Church to acquire the property. I also strongly believed that the support of the Church would be critical in gaining the approval of many City residents, since a substantial proportion of Yonkers residents are Catholic.

5. At various times during the weekend prior to January 25, I was advised, either by the City manager or by attorneys from Skadden Arps, that efforts were underway to contact his Eminence John Cardinal O'Connor (the "Cardinal") to ascertain whether the Cardinal would consent not only to the use of the Seminary site, but to lend his support to the Consent Decree embodying site designations of all 200 units of public housing. I was led to believe that the only basis upon which the Seminary site would be included in a Consent Decree would be if the Church voluntarily agreed to its use.

6. During the weekend prior to January 25, 1988, I was advised by Mr. McAmis of Skadden Arps that the Cardinal had indicated his willingness to permit the development of public housing at the Seminary site. Moreover, the Cardinal's willingness to have the Seminary site used for public housing, so I was advised, was to be joined with a statement to be issued by the Cardinal making known the Church's intent not only to facilitate the construction of housing on the site by giving extra land for recreation but to welcome and aid the tenants who would live there. Further, McAmis advised me that the Cardinal would state that he welcomed the opportunity to participate in a tangible demonstration of the Church's commitment to social justice and the resolution of the litigation.

7. Upon being advised of the Church's position, I indicated to the City's attorneys that, in light of the Church's support, I was now prepared to support a Consent Decree which included the Seminary site. I did so with the hope and belief that the support of the Church would be of critical importance in seeking to gain widespread community acceptance for a Consent Decree, together with the fact that the addition of the Seminary site helped to reduce densities on the other six sites to be picked by the Court. Without the Church's support for the Seminary site as well as the entire plan, I would not have voted to enter into the Consent Decree. Thereafter, upon learning that the NAACP and the Department of Justice also agreed to the inclusion of the Seminary site, I voted in support of the City Council resolution adopting the Consent Decree.

8. I first became aware that some sort of misunderstanding had taken place with regard to obtaining consent for the use of the Seminary site when, in March, the Cardinal wrote a letter to Judge Sand, in which he expressly stated that he did not volunteer the Seminary site, but decided to "yield graciously" upon being presented with what he understood to be an accomplished fact. The Cardinal also stated that he would have been concerned by its designation had he been aware of the concentration of selected sites in the

parish of St. John the Baptist (see attached as Exhibit A the letter of March 21, 1988 from the Cardinal to the Court).

9. Later, on April 15, 1988, the Cardinal once again wrote the Court (attached as Exhibit B), stating that he did not volunteer the site, but rather agreed to it only after being advised that it would be condemned by order of the Court. The Cardinal also expressed concern that the density of public housing units in Southeast Yonkers is excessive, particularly in St. John's Parish. Later, on April 24, 1988, the Cardinal was quoted in a front page article in *The Reporter Dispatch* that the plan was "fatally flawed", and that he had been misled into agreeing to sell Church property (Exhibit C). Most recently, Judge Mulligan of Skadden, Arps, Slate, Meagher & Flom issued a statement on April 25, 1988 (Exhibit D) in which he confirmed that a misunderstanding may have occurred relating to the circumstances under which the Cardinal agreed to the designation of the Seminary site.

10. The subsequent statements by the Cardinal regarding the circumstances under which he agreed to permit the Seminary site to be used for public housing has completely vitiated the basis upon which I cast my vote in favor of the Consent Decree. The Cardinal's support for both the Seminary site as well as the whole plan was a critical element in my decision to support a Consent Decree. It is also my understanding that the Church's support for the Seminary site was central to the decision by the Justice Department and NAACP to include that site on the list, and therefore to an agreement at all. In light of the subsequent statements by the Cardinal, and the confirmation by all parties that the Seminary site would not have been selected but for the Cardinal's willing consent, it is clear to me that the Consent Decree was entered into under mutual mistake or misrepresentation regarding the basis for the Church's cooperation and support for the plan. In the absence of the Church's support, the Consent Decree should be vacated.

_____

Nicholas C. Wasicsko

Sworn to and subscribe before
me this 2nd day of May, 1988.

NOTARY PUBLIC

Eric W. Schoen
Notary Public State of New York
No. 60-4674177
Qualified in Westchester County
Commission Expires March __, 1989

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL, ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AT.,

80 CIV. 6761 (LBS)

AFFIDAVIT

Plaintiff-Intervenors,

YONKERS BOARD OF EDUCATION, CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

EDWARD J. FAGAN, Jr., being duly sworn, deposes and says:

1. I am the City Councilmember for the Sixth District of the City of Yonkers ("City"), and I have served terms as a City Councilmember from 1980 through 1983 and from 1986 to present. I make this affidavit upon personal knowledge, in support of the City's Motion to Vacate the Consent Decree entered January 28, 1988.

2. During the period late December, 1987, through January 28, 1988, I was present at numerous briefing sessions with the City's attorneys relating to the negotiations for a consent decree, and I received numerous telephone calls from the Mayor, City Manager, or the City's attorneys regarding the status of these negotiations.

3. In the days immediately prior to January 25, 1988, I was advised that, in the absence of a Consent Decree, the Court intended to enter its own order designating six sites for the development of the 200 units of public housing: Whitman, School 4, Lincoln, Helena, Wrexham, and Clark/Loring (the "Six Sites"). I was not willing to support a consent decree using only the Six Sites because, among other reasons, such a plan would have placed too many units on the Whitman site, which is located in my District.

4. I was aware that the Seminary site had been listed by the Outside Housing Advisor, Oscar Newman, on a list of privately-owned sites issued in early December, 1987. I was also aware that HUD did not rule out further consideration of the Seminary site after their preliminary review later in December. As a potential site, however, I strongly held the view that the City should not agree to acquire the Seminary site without the express permission of the Archdiocese of New York ("the Church"), the owner of the property. This belief was premised on two factors: first, I believed that the support of the Church - a major social force in the City of Yonkers - would be crucial in gaining the approval of many of the City residents, including many in my district, since a substantial proportion of Yonkers residents are Catholic and the Church enjoys an excellent reputation generally in the City. Second, I knew from past experience that the Church was a powerful opponent if it disagreed with the public policy of the City, as the Church had been successful in defeating the City's attempt to levy increased water frontage taxes in 1984. I therefore had sound reasons for believing that public support for the use of the Seminary site and the Consent Decree as a whole would be critically lacking in the absence of consent from the Church to acquire the property.

5. Prior to January 25, 1988, I was advised by the Mayor that efforts were underway to contact his Eminence John Cardinal O'Connor (the "Cardinal") to ascertain whether the Cardinal would consent not only to the use of the Seminary site, but also to lending his support to the Consent Decree embodying site designations of all 200 units of public housing.

6. On Sunday, January 24, 1988, I was advised by the Mayor and Mr. McAmis of Skadden Arps that the Cardinal has indicated his willingness to give approval to the development of public housing at the Seminary site. I was also advised that the Cardinal's willingness to have the Seminary site used for public housing was to be joined with a press release to be issued by the Cardinal making known the Church's intent not only to facilitate the construction of housing on the site but to welcome and aid the tenants who would live there as an opportunity to participate in a tangible demonstration of the Church's commitment to social justice and the resolution of the litigation.

7. Upon being advised of the Church's position, I indicated to both the Mayor and the City's attorneys that, in light of the Church's support, I was now prepared to support a Consent Decree which included the Seminary site. I did so with the hope and belief that the support of the Church would be of critical importance in seeking to gain widespread community acceptance for a Consent Decree, as the support of a major social force in Yonkers had been obtained to address this major social issue. I was also satisfied that, with the addition of the Seminary site, the density on the Whitman site would be reduced to 40 units, an acceptable level in the context of a Consent Decree. Without the Church's support for the Seminary site as well as the entire plan, I would not have voted to enter into the Consent Decree. Thereafter, upon being advised that the Department of Justice and the NAACP also agreed to the inclusion of the Seminary site in a Consent Decree, I voted in support of the City Council resolution adopting the Consent Decree.

8. I have reviewed the letters dated March 21, 1988 and April 15, 1988, from the Cardinal to Judge Sand, attached elsewhere as exhibits in support of the City's motion. It is clear that the subsequent statements by the Cardinal regarding the circumstances under which he agreed to permit the Seminary site to be used for public housing have completely vitiated the basis for agreeing to the Consent Decree. The Cardinal's support for both the Seminary site as well as the whole plan was a critical element in my decision to support a Consent Decree. In light of the subsequent statements by the Cardinal, and the subsequent confirmation by all parties that the Seminary site would not have been selected but for the Cardinal's willing consent, it is clear to me that the Consent Decree was entered into under mutual mistake or misrepresentation regarding the basis for the Church's cooperation and support for the plan. In the absence of the Church's support, the Consent Decree should be vacated.

_____

Edward Fagan

Sworn to and subscribe before
me this 28th day, April 1988.

_____

Notary Public

Lori A. Faeth
Notary Public, State of New York
No. 4947287
Qualified in Westchester County
Commission Expires May 31, 1989.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL, ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AT.,

Plaintiff-Intervenors,

80 CIV. 6761 (LBS)

AFFIDAVIT

YONKERS BOARD OF EDUCATION, CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

CHARLES A. COLA, being duly sworn, deposes and says:

1. I am the City Councilmember from the Third District of the City of Yonkers (the "City"). I previously served as a City Councilmember from 1972 through 1979 and from 1982 through 1983. I make this affidavit upon personal knowledge, in support of the City's Motion to Vacate the Consent Decree entered January 28, 1988.

2. During the period late December, 1987, through January 28, 1988, I was present at numerous briefing sessions with the City's attorneys during this period of time, and received frequent telephone calls from the Mayor, City Manager, or the City's attorneys regarding the status of the negotiations.

3. In the days immediately prior to January 25, 1988, I was advised that, in the absence of a Consent Decree, the Court intended to enter its own order designating six sites for the development of the 200 units of public housing: Whitman, School 4, Lincoln, Helena, Wrexham, and Clark/Loring.

4. I was aware that the Outside Housing Advisor, Oscar Newman, had identified the Seminary site as a potential site for public housing in early December, 1987. I held the view that the City should not agree to acquire the Seminary site without the express permission of the Archidocese of New York (the "Church"), the owner of the property. I believed that public support for the use of that site and the Consent Decree as a whole would be critically lacking in the absence of consent from the Church to acquire the property. I also strongly believed that the support of the Church would be crucial in gaining the approval of many of City residents, especially those in my district, since a substantial proportion of Yonkers residents are Catholic. Since I understood that no other party wanted to use the Seminary site without the Church's consent, I was of the belief that in a Consent Decree would be if the Church voluntarily agreed to its use.

5. On the weekend before January 25, 1988, I was adivsed by the City's attorneys that his Eminence John Cardinal O'Connor (the "Cardinal") had indicated his willingness to permit the development of public housing at the Seminary site. Moreover, the Cardinal's willingness to have the Seminary site used for public housing, so I was advised, was to be joined with a press release to be issued by the Cardinal making known the Church's intent not only to facilitate the construction of housing on the site but to welcome

and aid the tenants who would live there. Further, we were advised that the Cardinal would state that he welcomed the opportunity to participate in a tangible demonstration of the Church's commitment to social justice and the resolution of the litigation.

6. Upon being advised of the Church's position, I indicated to the City's attorneys that, in light of the Church's support, I was now prepared to support a Consent Decree which included the Seminary site. I did so with the hope and belief that the support of the Church would be of critical importance in seeking to gain widespread community acceptance for a Consent Decree, together with the fact that the addition of the Seminary site helped to reduce densities on the other sites to be picked by the Court. Without the Church's support for the Seminary site as well as the entire plan, I would not have voted to enter into the Consent Decree.

7. I have reviewed the letters dated March 21, 1988 and April 15, 1988, from Cardinal O'Connor to Judge Sand, attached as exhibits to the City's motion. In my opinion, the subsequent statements by the Cardinal regarding the circumstances under which he agreed to permit the Seminary site to be used for public housing have completely vitiated the basis upon which I cast my vote in favor of the Consent Decree. The Cardinal's support for both the Seminary site as well as the whole plan was a critical element in my decision to support a Consent Decree. It is also my understanding that the Church's support for the Seminary site was central to the decision by the Justice Department and NAACP to include that site on the list, and therefore to an agreement at all. In light of the subsequent statements by the Cardinal, and the confirmation by all parties that the Seminary site would not have been selected but for the Cardinal's willing consent, it is clear to me that the Consent Decree was entered into under mutual mistake or misrepresentation regarding the basis for the

Church's cooperation and support for the plan. In the absence of the Church's support, the Consent Decree should be vacated.

Charles A. Cola

Sworn to and subscribe before
me this 2nd day, May, 1988.

Notary Public

Loria A. Faeth
Notary Public, State of New York
No.
Qualified in Westchester County
Commission Expires May 31, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL, ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AT.,

80 CIV. 6761 (LBS)

AFFIDAVIT

Plaintiff-Intervenors,

YONKERS BOARD OF EDUCATION, CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

NICHOLAS V. LONGO, being duly sworn, deposes and says:

1. I am currently councilmember for the Fifth District of the City of Yonkers (the "City"), and I have served as a City Councilmember continuously since 1974. I am the chairman of the Rules Committee and Minority Leader. I make this affidavit upon personal knowledge, in support of the City's Motion to Vacate the Consent Decree entered January 28, 1988.

2. During the period late December, 1987, through January 28, 1988, I was actively involved as a member of the City Council in providing direction to the City's attorneys in the negotiations leading to the Consent Decree. I was present at numerous briefing sessions with the City's attorneys during this period of time, and received frequent telephone calls from the City's attorneys regarding the status of the negotiations.

3. In the days immediately prior to January 25, 1988, I was advised by the City's attorneys that, in the absence of a Consent Decree, the Court intended to enter its own order designating six sites for the development of the 200 units of public housing: Whitman, School 4, Lincoln, Helena, Wrexham, and Clark/Loring. The densities assigned to each of those sites would have been greater than I could have agreed to in the format of a Consent Decree, and therefore I had taken the position, concurred in by a majority of the City council members, to instruct our attorneys to advise the plaintiffs that unless additional sites could be agreed upon, there would be no Consent Decree based upon these six sites above.

4. I have always held the view that under no circumstances should the City agree to acquire the Seminary site without the express permission of the Archdiocese of New York ("the Church"), the owner of the property. This position, which to my knowledge is also shared by a majority property. My view was premised upon my belief that the lack of consent from the Church to acquire the property would completely vitiate public support for such a Consent Decree. I also strongly believed that the support of the Church would be critical in gaining the approval of many East Yonkers residents, including my constituents, a substantial proportion of whom are Catholic.

5. At various times during the weekend prior to January 25, I was advised by the Mayor and attorneys from Skadden Arps, that efforts were underway to contact his Eminence John Cardinal O'Connor (the "Cardinal") to ascertain whether the Cardinal would consent not only to the

use of the Seminary site, but to lend his support to the Consent Decree embodying site designations of all 200 units of public housing. During the same period of time, I recall being advised by Mr. McAmis that attorneys for plaintiffs -- that is Michael Sussman for the NAACP and Brian Heffernan for Department of Justice -- concurred with the proposition that the Seminary site should not be included without the consent of the Church. I was therefore lead to believe that the only basis upon which the Seminary site would be included in a Consent Decree would be if the Church voluntarily agreed to its use.

6. On January 24, 1988, I was advised by the City's attorney, Mr. McAmis, that the Cardinal had indicated his willingness to permit the development of public housing at the Seminary site. Moreover, the Cardinal's willingness to have the Seminary site used for public housing, so I was advised, was joined with a statement to be issued by the Cardinal, making known the Church's intent not only to facilitate the construction of housing on the site but to welcome and aid the tenants who would live there. Further, we were advised that the Cardinal would state that he welcomed the opportunity to participate in a tangible demonstration of the Church's commitment to social justice and the resolution of the litigation.

7. Upon being advised of the Church's position, I indicated to the City's attorneys that, in light of the Church's support, I was now prepared to support a Consent Decree which included the Seminary site. I did so with the hope and belief that the support of the Church would be of critical importance in seeking to gain widespread community acceptance for a Consent Decree, together with the fact that the addition of the Seminary site helped to reduce densities on the other six sites to be picked by the Court. Without the Church's support for the Seminary site as well as the entire plan, the Government and the NAACP would not have agreed to the inclusion of the Seminary site in a consent decree, and I would not have voted to enter into the Consent Decree.

8. I first became aware that some sort of misunderstanding had taken place with regard to obtaining consent for the use of

the Seminary site when, in March, the Cardinal wrote a letter to Judge Sand, in which he expressly stated that he did not volunteer the Seminary site, but decided to "yield graciously" upon being presented with what he understood to be an accomplished fact. The Cardinal also stated that he would have been concerned by its designation had he been aware of the concentration of selected sites in the parish of St. John the Baptist (See attached as Exhibit A the March 21, 1988 letter from Cardinal O'Connor to Judge Sand, at page 3).

9. Later, on April 15, 1988, the Cardinal once again wrote the Court (see Exhibit B), setting forth clearly his belief that he did not volunteer the site, but rather agreed to it only after being advised that it would be condemned by order of the Court. The Cardinal also expressed concern that the density of public housing units in Southeast Yonkers is excessive, particularly in St. John's Parish.

10. The subsequent statements by the Cardinal regarding the circumstances under which he agreed to permit the Seminary site to be used for public housing have completely vitiated the basis upon which I cast my vote in favor of the Consent Decree. The Cardinal's support for both the Seminary site as well as the whole plan was a critical element in my decision to support a Consent Decree. It is also my understanding that the Church's support for the Seminary site was central to the decision by the Justice Department and NAACP to include that site on the list, and therefore to an agreement at all. In light of the subsequent statements by the Cardinal, and the confirmation by all parties that the Seminary site would not have been selected but for the Cardinal's willing consent, it is clear to me that the Consent Decree was entered into under mutual mistake or misrepresentation regarding the

basis for the Church's cooperation and support for the plan. In the absence of the Church's support, the Consent Decree should be vacated.

Nicholas V. Longo

Sworn to and subscribe before
me this 29 day, April 1988.

Notary Public

SAM J. MALUTICH
Notary Public, State of New York
No. 60-2496450
Qualified in Westchester County
Term Expires Nov. 30, 1989

Memorandum of City of Yonkers in Opposition to Joint Motion to Enter Long Term Plan Order, Dated May 16, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

80 CIV. 6761 (LBS)

-and-

YONKERS BRANCH-NATIONAL, ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET. AL.*,

Plaintiff-Intervenors,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

CITY OF YONKERS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' JOINT MOTION TO ENTER PROPOSED LONG-TERM PLAN

The City of Yonkers ("City") files this Memorandum of Law in opposition to the joint motion filed by Plaintiff United States of America ("DOJ") and Plaintiffs-Intervenors Yonkers Branch-National Association for the Advancement of Colored People ("NAACP") to enter as an order the details of the long-term plan.

On January 28, 1988, the Court entered the First Remedial Consent Decree in Equity ("the Consent Decree"). In the Consent Decree, a goal of 800 units was established for the production of assisted housing under the "Long Term Plan" ordered in Part VI of the Housing Remedy Order ("HRO") of May 28, 1986. Section 17 of the Consent Decree established the basic approach for encouraging the development of assisted housing: the City is required to adopt legislation conditioning the construction of all future multi-family housing on the inclusion of at least 20% assisted units. Virtually all of the details of this plan were left unspecified in the Consent Decree; Section 18 notes the numerous issues unresolved at the time of the entry of the Consent Decree.

On May 2, 1988, the City filed a motion to vacate the Consent Decree in its entirety on the grounds that it had been entered into under a mutual mistake of material fact. The City submits that the long term aspects of the Consent Decree were part and parcel of the short term aspects, and that the Consent Decree is equally flawed based upon the mutual mistake of material fact underlying the City's consent to the plan. The City therefore submits that the Consent Decree does not provide a proper basis for imposing upon the City a long term goal of 800 units of assisted housing. In the event that its motion is granted, the City submits that the Court should deny Plaintiffs' motion because no numerical housing goal or quota should be imposed as part of the long-term plan, and, as a result, many of the detailed provisions set forth in the proposed order are either unnecessary or unduly restrictive.[1]

---

[1] On December 11, 1987, the Court invited the parties to submit their views on the question of "how many units should be built pursuant to the long-term housing plan ..., the timing of such construction and any other comments that the parties deem appropriate." Tr. of Proceedings, December 11, 1987 at 3-4. In response to that request, the City filed a memorandum on January 14, 1988, which urged that no numerical quota be imposed as part of a long-term housing plan. The City urged at that time, and continues to urge, that the imposition of any specific numerical goal is wholly inconsistent with the principals enunciated in Milliken v.

In the event that the Court does not vacate the Consent Decree, the City nevertheless opposes the entry of the proposed long term order on several specific grounds: (a) its requirement that all multi-family housing be built in at least an "80/20" configuration is excessively restrictive, and the City proposes that the order contain a variance procedure for permitting less than 20% assisted units (though not less than 10%) in any development; (b) its failure to provide for any efficiency or one bedroom units in the affordable price categories is contrary to the evidence that a need for such units exist; and (c) no new Office of Implementation is appropriate or necessary, since existing City agencies and resources should be given the responsibility of implementing the plan. In addition, numerous specific changes should be made with regard to the provisions dealing with resale restrictions (Section 4), architectural integration (Section 6), mandated incentives (Section 8), and the Affordable Housing Trust Fund (Section 9).

ARGUMENT

ASSUMING THAT THE CONSENT DECREE IS NOT VACATED, THE PROPOSED LONG-TERM PLAN SHOULD BE MODIFIED TO ELIMINATE SEVERAL OF ITS UNNECESSARY AND OVERLY RESTRICTIVE REQUIREMENTS.

Numerous aspects of the proposed order contain restrictions and requirements that will hamper, not foster, the development of assisted housing under the long-term plan. Since it is in the interest of all parties to devise a plan which

---

Bradley, 433 US 267, 280-81 (1977), that the remedy should carefully be tailored to remedy the specific condition found to violate the constitution. The basis for the City's position that the imposition of a specific goal is inappropriate was set forth in detail in the January 14th submission, and will not be reiterated here.

has the maximum likelihood of success, the City offers the following comments and modifications to the proposed plan so as to provide greater flexibility and opportunity for achieving the production of assisted housing as expeditiously as possible.

A. A Variance Procedure Should Be Established To Permit Developments With Less Than 20% Assisted Units, But More Than 10%.

Section 1(a) of the proposed order provides that every multi-family housing development in the City of Yonkers must have at least 20% assisted units in order to gain City approval.

While a 20% setaside for each new multi-family development is a worthy goal, it should not be established as an inflexible requirement. There is simply nothing sacred about a 20% setaside. The research of experts retained by the City, Abeles Schwartz Associates, Inc., who have had substantial experience advising communities and developers under the New Jersey Supreme Court's *Mt. Laurel* I and II decisions and the State Fair Housing Act, have found that some degree of flexibility is absolutely essential in order to ensure that some development occurs.

This observation has also been made by Allan Mallach, previously an expert for the Government during the remedial phase of this case. In his book *Inclusionary Housing Program: Policies and Practices*, Mallach succinctly states: "The ordinance must establish a reasonable and non-excessive goal for the development of low- and moderate- income housing, and must establish land use standards which do not interfere with the achievement of that goal." (emphasis added) Ch. 5, at p. 107. While he finds that the 20% setaside is a basic rule of thumb, he goes on to observe that, depending on the amount of the subsidy, lesser amounts of affordable housing included in a development can themselves be a substantial burden on developers, thereby chilling development efforts (p.107-108). With respect to incentives, Mallach has observed that the plan in Lewisboro, New York, is "one of the

very few voluntary density bonus ordinances that has resulted in any lower-income housing being provided without federal subsidies." p.114 The Lewisboro program had an effective setaside of 11%.

The need for flexibility is self evident. Where the existing zoning is low density (e.g., single family), the density bonus approach (upzoning granted by or under the zoning ordinance) can easily support the 20% setaside because of the enormous increase in density allowed - often a 4 or 5 fold increase in density. In these situations, the increase in denisty granted will not unduly burden the infrastructure, nor will the ensuing development be entirely out of character with the surrounding neighborhood. We know that there are comparatively few sites in Yonkers which can absorb such an enormous increase in allowable density. In fact, many samll sites in Yonkers which would be otherwise suitable for the development of affordable housing are already zoned for multi-family housing, in some cases at densities up to 100 units to the acre; often, these sites are also already burdened with site-specific impediments to ecomonic development. For many of these sites, the 20% aside presents an insuperable barrier to development, as the maximum feasible density bonus will provide too small an incentive to develop 20% assisted units. Given the diversity of sites, and the difficulty of developing multi-family housing under any circumstances in Yonkers, greater flexibility is an absolute necessity.

THIS PAGE LEFT BLANK INTENTIONALLY

The experience of Abeles Schwartz Associates in New Jersey has been that to achieve a 20% setaside, anywhere between a four and a eight-fold increase in density is typically required. Development of assisted housing using such a large density bonus works only where land is not the scarce resource it tends to be in Yonkers. It works only where increases in density can be easily absorbed, as in the prototypical conversion of farmland to a housing subdivision.

While the City continues to endorse the 20% goal as the figure which should be strived for, it proposes that a variance procedure be created whereby a developer can, in making a proposal, attempt to demonstrate that the economics of the situation simply do not enable him to meet the 20% setaside. Having this type of variance procedure will ensure that the City can respond affirmatively to development proposals, without completely freezing out more marginal developers who cannot achieve the 20% setaside.[2]

Nor should the Court, in the first instance, be concerned that the City will automatically reduce the percentage setaside for all developers. It is in the City's best interest to achieve the goal *as quickly as possible*. Moreover, giving the City some flexibility now will prevent a situation where the City must come back to the Court repeatedly, every time a developer makes a proposal, in order to attempt to gain some modification from the requirements of the Order. The plaintiffs will be apprised of all proposals, and the variance procedure to be included can require that the Plaintiffs have an adequate opportunity to comment on any proposal in which the City

---

2 The need for flexibility is already evident from the provisions of Section 2(c) of the proposed Order, which permits the City to exempt from the requirements of the long-term plan any multi-family housing development of fewer than 10 units. This exemption recognizes that there are going to be instances in which small developments could not efficiently or economically provide for the development of assisted housing due to a lack of economies of scale. The City's proposal for a variance procedure merely recognizes that flexibility will be needed in order to encourage development.

proposes to deviate from the 20% setaside figure. All-in-all, the City urges that the Court adopt such a variance procedure so as to increase the likelihood that some affordable housing will be built under circumstances where a developer might otherwise say "No go". The end result is some housing rather than none.

B. *The Plan's Failure to Encourage Any Efficiency or One Bedroom Units Makes Bad Planning Sense.*

Section 1(c) of the proposed stipulates, in effect, that for every 10 assisted housing units to be developed, seven must be 2-bedroom units and three must be 3-bedroom units. The proposed Order essentially bars the development of any efficiency or 1-bedroom assisted units by refusing to give credit toward the 800 goal for any such units. The City submits that this aspect of the proposed long-term plan contains overly restrictive and unnecessary provisions, and should be eliminated for three reasons.

First, the failure of the Plan to provide for any studio or 1-bedroom apartments totally ignores the obvious and demonstrated need for smaller affordable units. Demographers have been noting the long-term decline in the average size of households over the past decade, and most new developments contain a healthy proportion of efficiency and 1-bedroom units to tap this emerging market.[3]

The Court may be surprised to learn that among the four largest "family" projects in the Municipal Housing Authority

---

[3] The 1980 census data for Yonkers shows that approximately one-quarter of all renter households in need of assistance consist of one or two person households under the age of 62 (4839 small households out of 18,652 total in need of housing assistance). This data clearly demonstrates that there is a need among the non-elderly for small units. If persons over age 62 are included, this figure would naturally increase substantially.

itself, 29.7% of all units are 1-bedroom units. The following data was compiled by Teri Waivada, Director of the Yonkers Community Development Agency, from sources at the MHA:

Project	Total # of Units	# of 1 BR. Units	# 1 Br. Utilized By Small Families
E. Burke Gardens	550	234	40
Calgano	278	67	67
Schlobohm	411	37	37
Cottage Gardens	236	106	40
Total	1,495	444	183
Total %	100%	29.7%	12.3%

Of the 1-bedroom units in these municipal housing projects, approximately 12% are utilized by small families, and the remaining are occupied by senior citizens, handicapped or the disabled.

Data under the Section 8 program paints a similar picture. The MHA currently administers 832 Section 8 rental assistance certificates, of which 140 (or 16.8%) are 1-bedroom certificates. These certificates are utilized as follows:

80 Elderly Households	-	(57.0%)
20 Handicapped/Desabled	-	(14.0%)
35 Small Families	-	(25.0%)
5 Certificate Holders Seeking Units	-	(3.5%)

This data (also obtained from the MHA) clearly establishes that there is a current and ongoing need for 1-bedroom units in an affordable price range.[4]

These conclusions are even further buttressed by the fact that the recipients of MHA units and Section 8 certificates are at the lowest end of the income scale of the apartments to be served by the long-term plan. As income goes up, household size tends to go down. On the basis of need alone, therefore, the City strongly urges that the overly restrictive and counter-productive requirements of Section 1(c) be eliminated, and that a more flexible allocation of 5 units between studio, 1, 2 and 3 bedroom buildings be permitted.[5] Specifically, the City urges that a more realistic set of guidelines be established based on an in-depth study of the population and income characteristics, to be conducted by Abeles Schwartz.[6]

But there is a second and equally compelling reason for having at least some efficiency and 1-bedroom units provided under the long-term plan. The amount of subsidy which must be provided by a developer is less for a smaller unit. Therefore, given the scarce resources to encourage production of affordable housing, more efficient use of all the resources

---

[4] Data recently submitted by the OHA to the Court on May 12, 1988, confirms these conclusions. On the Section 8 waiting list, nearly 20% of the need is for one-bedroom units (382 out of 1927, not including homeless). While the need for one-bedroom units is lower for public housing, it is still approximately 10% of total demand.

[5] The City also notes that all 200 units of public housing is intended for large families. This fact reinforces the need to designate some of the assisted housing to be developed under the long term plan for smaller households.

[6] Regulations established by the New Jersey Council of Affordable Housing permit up to a maximum of 20% of the units be for efficiency apartments, and that a minimum of 15% three bedroom and 35% two bedroom units be built. As a result, up to 30% of the units can be one bedrooms.

available to the City, especially in the area of zoning upgrades, can be achieved by permitting some 1-bedroom apartments.

Finally, there are significant marketing implications for the prohibition of small units. In the current "Yuppie Market", most developers of market rate housing will concentrate on the smaller units, such as efficiencies, 1's and perhaps 2-bedrooms. The Abeles Schwartz consultants have noted that marketing efforts will be more difficult for a developer who has to convince market rate people to accept rentals or purchases of smaller apartments when the larger ones are being reserved for lower income residents. There will be an inevitable tendency for the larger assisted family to overwhelm the 1 and 2 person households who are most likely to rent or purchase the smaller market units.

In conclusion, the limitations contained in the proposed Order may deter developers from building any housing, and it will completely choke off construction of a valuable resource: effeciency and one bedroom apartments at affordable cost. The proposal is both unwise and counter-productive.[7] The City therefore urges that efficiency one-bedroom units be permitted to count toward the goal for assisted housing, and that no specific allocation between one, two or three bedroom units be established now until further study or concrete experience has been established through the development process.

C. *The Term of the Transfer Restriction Should Be Reduced to 20 Years.*

Section 4 of the proposed order requires, *inter alia*, that the transfer, resale and occupancy restrictions apply for 30 years. The New Jersey Council on Affordable Housing ("COAH")

---

[7] Development is, of course, site specific. Some sites simply may not have the ability to support the larger 2 and 3 bedroom units mandated by the proposed order. This problem is explicitly recognized in the unit configurations recently recommended by the OHA for the public housing sites. The complete ban on one bedroom apartments is simply ill-advised.

has set a state-wide standard restriction of 20 years (for new construction) for a variety of reasons, not the least important of which is that the financial community is often unwilling to accept restrictions beyond the 20 year limit. The City respectfully urges that the Court go with the limit set by COAH, the one group that has real experience in attempting to develop affordable housing, and not try to set a new standard which will be immediately shunned by the development and finance community.

D. *There Is No Need For The Implementation Office*

In Section 11 of the proposed long-term order, Plaintiffs propose the creation of an Implementation Office as part of the Fair Housing Office (the "FHO"), under the direction of the Executive Director of the FHO. Section 11 proposes that the Implementation Office shall act as an ombudsman before all city agencies involved in the process of approving multi-family housing developments. Plaintiffs propose that the office also have the power to pre-approve or screen particular proposals, assist developers in the application process, and implement a marketing program to make widely known the availability of mandated incentives for assisted housing.

The City opposes the creation of a separate Implementation Office as unnecessary and excessively expensive. Rather, the City proposes the the responsibility for carrying out the City's obligations under the long-term plan be vested in an existing office, the Department of Planning and Development, under the direction of the City Manager.[8] This office is headed by an experienced planner (Philip Pistone), who together with the other Bureau chiefs have intimate knowledge of the City and are thoroughly familiar with the development process (e.g. environmental impact, environmental assessments and impact statements, traffic engineering, provision of utilities, etc.) and

---

[8] The Department of Planning and Development is comprised of the Planning Bureau, the Bureau of Community Development, the Bureau of Housing and Building, the Plumbing Bureau, and the Real Estate Bureau.

the City's zoning ordinance. Their skills and ability should be harnessed, not ignored. The simple fact is that coordination of effort between offices with overlapping -- and perhaps even conflicting jurisdiction -- is a recipe for delay. The City has a substantial incentive to make the plan work (i.e. to minimize the need in future years to use City-land, especially park land for long-term housing, and to get the Court out of its current oversight posture). The fundamental skills needed for the effective implementation of the long-term plan already exist and are in place. It should be the responsibily of the City Manager, together with existing or additional staff, to implement the long-term plan.

The Fair Housing Office, on the other hand, is not properly equipped to deal with planning and development issues, as it lacks the necessary expertise. Developing that expertise in a new office would require both substantial time to acquire as well as substantial expense. Thus, for example, the candidate for that office proposed by the Plaintiffs is seeking a salary in the mid $50,000.00 range, and his proposal includes the hiring of additional development staff. The City believes that its current staff (the Director of Planning and the Commissioner of Planning and Community Development) have the necessary background to implement these programs, and, if necessary, additional staff can be hired within those offices.

Another advantage of putting the responsibility for implementation within an existing office is that it avoids unnecessary duplication of effort and highlights responsibility for achieving results. The Department of Planning and Community Development is experienced in dealings with developers; it has made significant efforts to improve City processing of development proposals in the last several years. The Court explicitly noted this in its November 19, 1987, Freeze Order, noting that the City's agencies were adept at dealing with and processing private development proposals. Since the entire thrust of the long-term plan is to foster development of assisted housing through private developers, it makes perfect sense to have the same City agencies who are responsible for all other residential and economic development

proposals to have responsiblity for the development of assisted housing as well.

Moreover, keeping the responsibilities for implementation of the long-term plan separate from the Fair Housing Office helps to maintain and identify the specific functions of the FHO, thereby permitting the FHO to devote its energies and resources to its primary goals - fostering community awareness and acceptance of the goals of fair housing, and assisting specific individuals who have either experienced discrimination or who are seeking housing opportunities in areas outside of Southwest Yonkers.[9] Any connection between the development of assisted housing and the primary responsibilities of the Fair Housing Office is too attenuated to justify putting both functions in the same office. The City sees no functional or structural reason for combining those offices, and sees many reasons for not doing so.

E. *Architectural Integration.*

In Section 6 of the proposed Order, it is provided that developers "shall be required to make no location or architectural distinctions between assisted and other units." While it goes on to exempt the provision of amenities, the City believes that the basic restrictions contained in Section 6 are counter-productive and contrary to sound economic sense. Most importantly, the City believes that a developer should be entitled to make distinctions based on the size of the assisted unit, compared with non-assisted units; in other words, there is no reason that a 2-bedroom assisted unit must be of exactly the same square footage as a non-assisted 2-bedroom, so long as the assisted 2-bedroom meets certain minimum standards of livability. Thus, the City would propose that Section 6 be amended to include language along the following lines: "Nothing herein shall be interpreted to require that assisted and

---

9 Thus, for example, the City would suggest that the functions of screening and placement identified in Sections 4(g) and (H) of the proposed long-term plan be assigned to the FHO.

non-assisted units must be of the same square footage, so long as assisted units satisfy HUD's minimum property standards."

The City also urges that the first sentence be amended to insert the provision "shall make every effort" instead of "shall be required," so that other types of amenities would be permitted so as to enable the developer to take maximum advantage of the inherent profitability of certain apartments (e.g., the top floor of a building with good views).

F. *Mandated Incentives.*

Certain of the examples mentioned in the list of mandated incentives contained in Section 8 require clarification. Most important, Example 7 should be clarified so that it is clear that any City tax abatement offered is applicable only to the assisted units, just as provided in Example 9 in regard to assisted units put up for sale instead of rental.

Similarly, in the instance of Example 11, it also should be clear that any waiver of application or processing fees would be applicable only to the proportion of the development which is for assisted units, and not for the non-assisted units.

G. *The Affordable Housing Trust Fund.*

The City urges that the proposed order regarding the permissible uses for The Affordable Housing Trust Fund be liberalized so that greater flexibility is available for the use of those funds. Whereas Section 9 now provides that only two specific uses are permissible (site improvement costs and acquisition costs for local development corporation activities), an additional sentence should be added along the following lines:

> "Affordable Housing Trust Funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will efficiently obtain the overall objectives of the

> long-term plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust Funds in other permissible manners."

This type of language will provide additional flexibility, and may encourage the consideration and use of other innovative techniques for the development of assisted housing.

SUMMARY AND CONCLUSIONS

The overall thrust of the City's proposals is to give greater flexibility to the City to respond affirmatively to development proposals which do not meet all of the specific restrictions now set forth in Plaintiff's proposed long-term plan. These proposals have been made after consultation with the Planning and Development Consulting firm of Abeles Schwartz Associates, Inc., a respected and experienced group of planners and developers who have had hands-on experience with the development of affordable housing in New Jersey.[10]

We believe that the proposed changes suggested herein will have dual advantages: first, the development community will be apprised that the long-term developed by the Court has the necessary amount of realism and flexibility that is incumbent in any new attempt to foster and encourage the development of affordable housing. Additionally, and perhaps more practically, providing additional flexibility at this point will ensure that the City will not have to come back to the Court every time a developer makes a proposal which does not fit within the exact, and overly restrictive, parameters of the proposed long-term plan.

The City, of course, has substantial incentive to encourage the maximum amount of assisted housing in any given

---

[10] Abeles Schwartz has also been retained by counsel for the City to begin preparation of the zoning ordinance contemplated under Section 17 of first Consent Decree.

development, since that will achieve the fastest attainment of the 800 unit goal, and, of course, the elimination of all such further restrictions on development in the City of Yonkers. It will also not harm Plaintiffs, since Plaintiffs will have notice of any requests for variances from the basic structure of the plan, thereby eliminating any potential for abuse. Each development proposal will have to be carefully negotiated on its own individual merits. Trying to force the development of assisted housing into an overly restrictive mold, typified by the Plaintiff's proposed long-term plan, may have the unintended and unfortunate consequence of inhibiting developers from making any development proposals.

For all the reasons stated, the City opposes the entry of the long-term plan as an order in view of the pendency of its motion to vacate the Consent Decree. If the Consent Decree is not vacated, then the City opposes the entry of the proposed order in its current form since it contains provisions which are unduly restrictive and unnecessarily expensive, and may hinder rather than encourage the development of assisted housing.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

By: _____
Michael W. Sculnick

1 Dag Hammarskjold Plaza
New York, New York 10017

Attorneys for Defendants
City of Yonkers and
Yonkers Community
Devleopment Agency

Dated: May 16, 1988
New York, New York

Minutes of District Court Proceedings (Sand, J., May 19, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

Plaintiff,

and

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiff-Intervenors,

80 Civ. 8761 LAS

-against-

YONKERS BOARD OF EDUCATION: CITY OF YONKERS: and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants

----------X

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

May 19, 1988
5:15 p.m.

Third-Party Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants

(In Open Court)

THE COURT: There are two motions returnable. One related to the vacating of the consent decree and the other related to the long-term plan. With respect to the motion relating to the long-term plan, the city has among other things raised some fairly technical matters. I don't know whether the other parties have had an opportunity to consider them. I know the court has just received comments on that.

I think it is appropriate that we deal with the motion to vacate in the first instance and perhaps take up the motion with respect to the long-term plan on Monday or Tuesday of next week.

So what we will do this afternoon is hear the motion to vacate and Mr. Lee --

MR. SCULNICK: I would like to move for the introduce of Mr. Lee to the court and move for his admission pro hoc vice.

MR. SUSSMAN: No objection

MR. LEE: I will be very brief because our motion may be briefly summarized. There have been large changes that have occurred from what all perceive to be the church's position which was not only making available the Valentine Street property, but also welcoming the new neighbors to the present circumstance.

In our view there is no need whether those changes are real or changes in people's perceptions because the indelible fact is it is a different ballgame. We need no parse upon --

THE COURT: Excuse me if I may interrupt you. You say there is no need to parse upon whether they are real or unreal?

MR. LEE: Yes.

THE COURT: Let's start with some basic principles of good old common law as embodied in Rule 60(d).

This is a motion under 60(d) to vacate a consent decree on the ground of mutual mistake; is that correct?

MR. LEE: That is Ccorrect.

THE COURT: Now, my understanding of such a motion is that it seeks extraordinary relief. It is an equitable proceeding addressed to the court's discretion and the parties seeking to be relieved from the decree have a rather heavy burden.

MR. LEE: Also correct, yes.

THE COURT: And is it also not the case that someone seeking relief on the grounds of mutual consent must bear the burden of establishing that there is no form of relief available other than vacating the decree? Do we agree? Are we still in agreement?

MR. LEE: Basically. But at that point there is a point that I would like to make in addition to that.

THE COURT: I will give you as much time as you want. I appreciate your desire to be brief, but I think there are some serious questions here which are worth spending time.

I am looking at Farnsworth's Contracts, a Columbia Law School professor, Section 9.3. Failure of a Basic Assumption Mistake.

He says, "In determining whether the mistake has a material effect on the agreed exchange" he is talking about all contracts which you say is what one looks to basically, "a contract will also consider whether relief other than avoidance is available to the party adversely affected."

He cites the concept that if there is a mistake, but if all of the parties are agreeable to a modification to deal with the mistake to alleviate any hardship that results from the mistake, then one talks in terms of modification, amendment, reformation. One reaches "vacating" only if one is satisfied that these other forms of remedy are not available. Are we still in agreement.

MR. LEE: That is correct.

THE COURT: Now, would it not be the case that all of the problems said to motivate this motion to vacate would be solved if the consent decree were amended, the seminary site were deleted and another site not in an area of minority concentration, not in southeast Yonkers, meeting the HUD criteria were substituted.

MR. LEE: At that point we are in disagreement.

THE COURT: In what respect are in in disagreement?

MR. LEE: I thank you for setting the general parameters for me. The fundamental mistake that was made on the part of all parties was a mistake in assumption as to the approach to the degree of support that would be given to this consent decree by the Cardinal and by the Catholic Church.

Entering the decree is one thing, but I think we all have to look beyond that to the extent to which the plan can be successfully implemented.

THE COURT: Are you saying that the motivating force for the entry into the decree was the supposed support of the church?

MR. LEE: I am saying that that was one material element. It was as set forth in the various affidavits that have been filed at least on the part of the city council members and if you will, your Honor, sine qua non, the availability of one more property, seven instead of six is one consideration, but far

more important given all of the circumstances that exist in the City of Yonkers at the present time and given the large Catholic population within the City of Yonkers, it was a matter of a decree which was as characterized by the Cardinal which would not only receive support but would welcome the new neighbors into the neighborhood.

THE COURT: Do you have any reason to believe that if the seminary site were eliminated or at least the archdiocese were given the option to have the seminary site eliminated and another site not in southeast Yonkers was selected so that the density in southeast Yonkers would be reduced, that the housing plan would not have the full support of the Cardinal?

MR. LEE: That is something that I don't know.

THE COURT: Well, why don't you know that? Has anyone on behalf of the City of Yonkers said to the archdiocese, "You have expressed a concern with respect to the events leading up to the seminary site"? You have expressed a concern about the density in southeast Yonkers. You have also stated that the proposed addition of public housing in Yonkers (appendix A to the moving papers) affords the people of the archdiocese of New York as well as all New Yorkers the opportunity to support efforts to alleviate the serious housing situation that has so long existed in so many of our communities and to work toward racial harmony. The plan could deal a powerful blow to the injustices that plague our community." Then the Cardinal went on to express two concerns.

One related to parochial school attendance and that concern has been entirely obviated. The parties have consented to the deletion of that provision. The other concern that was expressed was with respect to density in southeast Yonkers. Why does the City of Yonkers come to the court and seek to vacate the consent decree on the grounds that it lacks the support of the Cardinal without first exploring what the position of the Cardinal would be if all of his concerns were met?

If the seminary site is deleted, all of the issues unfortunately raised about the conversations between Judge Mulligan and His Eminence become irrelevant. The question of density is southeast Yonkers is alleviated by the elimination of that site.

Why is it not entirely within the power of the City of Yonkers to extricate itself from the problem which it now perceives?

MR. LEE: If I may respond to that. What we are dealing with is a consent decree. It was entered into because there was consent among the parties. Far more crucial according to the affidavits that have been supplied to the court to the consent by the city council members to that decree than the simple issue of the physical property, and the corresponding impact on density was the kind of support that was expressed which the court has correctly just read and now what we have is the circumstance under which His Eminence has described the total decrease as fatally flawed.

THE COURT: You know, Mr. Lee, I have to tell you, in all respect, that historically that is not accurate. The discussion of the consent decree preceded by questions relating to the church or church property. This court was told that the parties were in the process of arriving at a consent decree before there was any discussion whatsoever of the church property. Factually what occurred is that there were sites listed by the outside housing advisor. The parties were given an opportunity to raise objections to it.

There were six sites to which there were few objections. The city was of the position that six sites would result in too great of density and the city wished to have a seventh or an eighth site. That was towards the end of one week. I am told there were negotiations among the parties.

Then in a robing room conference just immediately prior to the public announcement of the consent decree, there was

discussion of two other possible sites. One I think was called the Revlon site and the other was the seminary site. And the question was whether there would be consent to that.

Judge Mulligan went out and came back and he said he had conferred with the Cardinal and that -- I don't want to paraphrase his statement -- and that certainly there was no ojbection to it and that there was going to be a playground and other things. That was the first moment to my knowledge that it was known for a fact that the seminary site would be included and that the Cardinal would issue a statement that evening.

So at least insofar as I was aware, the support of the Cardinal was a very welcome occurrence, but certainly I was not aware of the fact that it was a major consideration in any negotiation and certainly the affidavits that have been furnished in opposition to the motion are consistent with what my understanding was. So with all respect and you were not there I realize, this is revisionist. This is not what occurred.

MR. LEE: I realize, your Honor, that different people can have different recollections of what happened. I will say that consistent not only with any affidavits filed by my clients but also with my understanding from them what happened, the negotiations had broken down and that but for the seminary site, which included not only the physical Valentine Street property that went with it from the Cardinal support, that what the city would have done would be have --

THE COURT: Do you want the court to adjourn this matter and do you want to have the opportunity for the city council of Yonkers to address an inquiry to the Cardinal which says in substance: "Your Eminence, the city council of Yonkers is desirous of obtaining your full support and cooperation in favor of implementing a housing remedy because we recognize as you recognize the magnitute of the need for this housing.

"We understand that there are problems with respect to the utilization of the seminary site and the density itself in east Yonkers. We wish to meet your concerns and we wish to meet your concerns by modifying the consent decree to eliminate the seminary site and to designate in its place another site acceptable to HUD outside southeast Yonkers, outside areas --

MR. LEE: Southwest.

THE COURT: Outside southeast Yonkers. It cannot be in either southwest Yonkers or Southeast Yonkers. But you should have no doubt, the city council should have no doubt that there are numerous sites which would meet all these criteria. Do you want the opportunity to put that inquiry to the Cardinal?

MR. LEE: I think preferable to that would be for the court itself maybe to play a more active role to vacate this decree and then under the aegis of the court's supervision for all parties --

THE COURT: Why, Mr. Lee, with all respect, sir, why would the first thing the court should do be to vacate a consent decree when there may be readily available a solution to the entire problem?

MR. LEE: I certainly think that is a possibility. This is something I haven't discussed with my clients. It seems to me that would be something that would be certainly worth exploring.

THE COURT: You are perhaps not aware that in March when this issue first began to surface, the court suggested to the City of Yonkers that it was entirely amenable to modify the consent decree.

Should we adjourn and resume this sometime tomorrow, Monday?

MR. LEE: I would think that if that procedure is to take place, it might take longer than tomorrow or Monday. And as I say, your Honor --

THE COURT: Tell me when? Understand as your client should understand that the worst aspect of what is occurring in Yonkers is the uncertainty and the continued nurturing of the hope on the part of many in Yonkers that public housing will never be built.

It has been made very clear to the court as I believe it has been made very clear to the elected representatives of Yonkers that there is a very visible, vociferous segment of the community which is opposed to any public housing, whether it is four sites or three sites or 110 or 100 units and so on.

This court feels a very strong obligation to end the uncertainty as soon as possible and to move forward. But you tell me when it is that you think you will have had the opportunity to discuss with the city council whether it is willing either to designate another site -- and let me repeat it -- because we shouldn't play games. There has been some game playing in the past in the designating of sites that have been previously rejected or things of that sort.

What we are talking about is a site not in southeast Yonkers, not in southwest Yonkers, not in any area of minority concentration, not one previously rejected, which will be acceptable to HUD as a substitute for the 22 unit site in southeast Yonkers for the seminary.

If such a site is designated promptly and you have the opportunity to ascertain from the archdiocese whether such a substitute designation does not meet all of the concerns which it has expressed, then the court will entertain -- hope it would be on consent -- an application to modify the consent decree to eliminate the seminary site and to substitute the alternate sites so designated.

How much time do you want for the exploration?

MR. LEE: Your Honor, I am tempted to say to you that I would like to try it. My obligation is to say two things. The

first is I am not sure the city will not agree to it or agree. I don't know.

THE COURT: And if the city doesn't agree to it, isn't that a complete answer to the motion under the principles of common law which you and I agreed to at the very outset of this? Isn't it the fact that if there is a party to an agreement who alleges mutual mistake and who has it entirely within his power to extricate himself from the consequences of that mistake, that there is not available to him the remedy of vacating the agreement?

I really believe that that is black letter law that we should not be debating. So it seems to me that the inquiry resolves the motion one way or the other. If the answer is "no" the city will not agree to that, then it seems to me the city has acknowledged it has no entitlement to this relief. If the city says, "Yes, we will do it", then I think we will be talking in terms of a modification of the agreement.

Tell me how much time you would like?

MR. LEE: May I say two things?

THE COURT: Yes.

MR. LEE: The caveat that I wanted to add to the court is since what the court has proposed and properly so does anticipate getting the archdiocese's consent, I think that is going to take more time. By the time there is both a determination by the city and then some negotiations with the archdiocese, I don't think we will be done by next Monday or Tuesday.

THE COURT: I understand the archdiocese's consent, that is something that the city is saying is dependent on its action. But tell me when. Any reasonable period of time?

MR. LEE: Your Honor --

THE COURT: Do you want to let the court know tomorrow how much time is required?

MR. LEE: I think I would be in a better position tomorrow to be able to advise you than I would today.

The second thing that I want to say is that I understand the court's position with respect to either we do something like that or the decree will stand as it is. What we are looking at is the modification or no modification but no vacation in any event.

I would simply add this and I recognize it is at variance with what the court has taken as consent decree. The relevance of both contract and also the court's order, the mutual mistake of fact goes not to the power of what the court could have ordered because the court could have entered the decree within the discretion of the court, but as a consent decree there are additional elements of the contract itself and the mutual mistake to which we are talking about goes to this decree, goes to the consent aspect of the consent decree.

THE COURT: What it goes to, what this motion goes to, Mr. Lee, in all respect, is the continued efforts by the city council to extricate itself from the political consequences which it believes have resulted from its assuming any degree of responsibility in connection with implementation of the housing plan. That is a matter which I dealt with in a previous opinion sometime in March. I am aware of that.

MR. SUSSMAN: March 31st.

THE COURT: And the motion says "Vacate the consent decree" and says nothing about what the consequences would be of vacating that consent decree. Presumably the consequences of that would be that the court would follow through on its stated intention to designate the six sites.

Indeed the parties will recall that there was an explicit request by counsel for the City of Yonkers that the court state that absent a consent decree, the six sites would be designated.

The planners, the experts will tell you as they have told me, that if the seminary site were eliminated and no other site substituted, what happens it that there is a modification of ten units in southeast Yonkers, but the unit density of each site is increased and the likelihood is that at least some of those sites rather than townhouses which are the most desirable and most compatible form of housing, there will have to be some other form of housing less desirable and less compatible.

Since this is a motion in equity, the court is entitled to consider what the consequences would be. And my understanding of the consequences of vacating the consent decree would be that insofar as the residents of southeast Yonkers are concerned, there would be a reduction of ten in the units and an increase in the density on each of the sites and they would not have the rather attractive townhouses but some other form of housing.

MR. LEE: In some instances.

THE COURT: In some instances. I think that we should adjourn and I think that you should advise chambers sometime tomorrow when it is that you think you would like to resume.

Let me complete a thought that I stated earlier which related to the obligation that this court feels to move forward.

We are, that is, HUD and The Housing Authority and the others, are moving forward with implementation of the plan in the consent decree. We are going to continue moving forward as expeditiously as we can. This matter which the City of Yonkers will now be considering on May 19th was a matter which it could have considered in March. There has to be an end to the uncertainty and to the false hopes by those in Yonkers who wish to see no public housing in Yonkers. So I would urge that the adjourned date be a date as soon as possible. We will adjourn sine die.

MR. SUSSMAN: I would like the record to note the Department of Justice's objection and the NAACP's objection. We see the city as having every opportunity to comply, and we see this as a wasteful exercise which will only in fact as the court stated intentionally inflame the hopes of those who would do nothing.

I think the city has made clear its opposition to going forward and frankly because Mr. Lee may be new to the case here, I don't think that should be a reason to provide the city additional time for delay.

THE COURT: I think I have indicated very clearly that the response of the city resolves the motion either way. If the city council is not prepared to designate another site or authorize the court to designate another site, it is not entitled to this relief.

If it is prepared to do that, and if we can in short order substitute for the seminary site, assuming that the archdiocese wishes to withdraw it, some other site that meets the HUD criteria, it seems to me that is in the best interest of all of the parties. The Department of Justice and NAACP's objections are noted. Adjournment sine die.

exploration of that. Thereafter, the court received the letter dated May 27th, Court Exhibit A, indicating that the city council again declined the court's suggestion.

This motion to set aside the consent decree based on mutual mistake of fact is an application under Rule 60 B. The legal principles relevant to such an application are well known. The remedy sought is extraordinary relief. The matter rests entirely within the discretion of the court, and equitable principles govern.

To be entitled to such a relief as counsel for Yonkers acknowledged at the hearing on the motion, an applicant must satisfy the burden of showing that no other satisfactory relief is available.

The decision of the city council not to designate or authorize the court to designate a substitute site is a decision which it has made, and the consequences of that decision rest with it. Seeking not to modify the consent decree but, rather, to vacate it, is a transparent ploy either to regain the right to appeal, and even more symbolically to avoid any responsibility for the court decree or implementation of the housing remedy order.

The motion is denied.

Now there remains the matter of the longterm plan. The court is prepared to address that if the parties are prepared to address that.

MR. SUSSMAN: We are prepared, your Honor, I believe. The only matter that just briefly might lead to any unpreparedness is that Mr. Dudley had circulated for the school board certain comments which the school board wanted included, and for the NAACP I had given him sort of a counterproposal on that. The government is still reviewing that issue. I don't believe the court was furnished.

THE COURT: I had not seen that.

MR. SUSSMAN: With that by either Mr. Dudley or myself as we were trying to resolve it short of involving the court.

Apart from that, your Honor, I believe the issue of the longterm plan has been fully briefed and presented to the court. I believe the court was given by Mr. Heffernan about ten days ago--

THE COURT: Yes.

MR. SUSSMAN: --a second proposed decree which incorporated what we felt possible, the comments of both the City of Yonkers and Mr. Newman, and that is where that matter stands, and we are prepared to argue it.

I believe that is by letter of June 2, 1988, your Honor received that from Mr. Heffernan.

THE COURT: Let me locate those papers.

MR. SUSSMAN: Here is the June 2nd.

THE COURT: Yes, thank you.
(Discussion off the record)

THE COURT: I have before me the plaintiff and plaintiff intervenor's proposed longterm plan, which was furnished by the Department of Justice and which embodies several but not all of the city's suggestions. Do counsel wish to be heard?

MR. SCULNICK: Yes, I would like to be heard, your Honor.

THE COURT: Yes.

MR. HEFFERNAN: Your Honor, since the United States and the NAACP has made the motion, I would request

that we first be allowed to argue the motion before Mr. Sculnick.

THE COURT: Very well. Mr. Sculnick was so overcome by the fact that he was on the same side at some point during the day, that he lost sight of that fact.

MR. SCULNICK: I was about to say I agreed with some of the points that the plaintiffs had made in their June 2nd submission, but there were others that I wanted to discuss.

THE COURT: Yes.

MR. HEFFERNAN: Your Honor, jointly the United States and the NAACP have submitted a motion to the court to adopt the proposed longterm plan pursuant both to the court's housing remedy order in May of 1986 and in the January 28th, 1988 first remedial consent decree at equity.

We move the court to enter the plan, and we believe the court should enter it for a number of reasons. First of all, your Honor, the housing remedy order of this case was issued over two years ago. It requires a long term plan, and, quite frankly, your Honor, the city has stonewalled long enough.

Secondly, your Honor, the city agreed in the first decree in January to do most of what is proposed in our order. That is still a valid decree, and it must be obeyed.

Thirdly and perhaps most importantly, your Honor, the proposed order is informed by the remedial proceedings in this case, the ample input of the outside housing advisor and the parties, by the first decree, and very importantly by weeks of negotiations between the city and counsel for the United States and the NAACP pursuant to specific provision in the first decree which required such negotiaton leading toward the entry of the second decree.

Unfortunately, your Honor, it was the city that chose to shut off those negotiations. Unfortunately, your Honor, it was the city which chose to renege on certain agreements in the first decree.

However, the court and the plaintiffs have the obligation to insure compliance with the housing remedy order, with the consent decree, and the court must act here because delay has certainly been long enough.

In fact, your Honor, as Mike Sculnick just alluded to, from our perspective the lack of real substantive problems which the city had or has with our proposed order speaks volumes as to the appropriateness of the longterm plan that we have submitted.

The city made some suggestions as Mr. Sculnick indicated in its comments on a proposed order, and I would like to deal with those suggestions rather than go through the entire longterm plan.

The city indicates that rather than have a 20 percent requirement for assisted versus market rate housing that there be perhaps a lower figure.

THE COURT: You are now dealing with Section 1 A of the plan?

MR.HEFFERNAN: Correct, your Honor, I believe. Your Honor, we believe that 20 percent figure is reasonable. It is practical. The city agreed to it in the first consent decree. Never objected. And now it has come in saying, well, perhaps we shouldn't have it.

We believe that there is, that 20 percent is a reasonable figure which should be specified. There needs to be something that the city needs to strive toward.

We do not have any objection to the city on perhaps a case by case basis coming in and indicating that in a particular

situtation less than 20 percent is going to result in more affordable housing than otherwise.

It is obviously the intent of the longterm plan to get the affordable housing, and if there is a way to do it which will not require the 20 percent, then, your Honor, that is something we can deal with.

THE COURT: Mr. Newman suggested that perhaps compromise would be the assertion in Section 1 A of a provision which would say in substance, "In instances where the existing zoning already permits the density of 60 units per acre or more, the number of assisted units can be limited to ten percent or more of the total number of units in the development with the understanding that the maximum density bonus that will then be given to the developer cannot be in excess of 50 percent over the permitted zoning."

MR. HEFFERNAN: Your Honor, we would have, the United States would have no problem with that. It seems to me that that is directed at the situation where doing otherwise would result in either too great concentration or simply wouldn't allow a feasible number of affordable units to be built, and that obviously is something that would flow throughout the entire longterm plan.

THE COURT: Is that acceptable to the NAACP?

MR. SUSSMAN: No, your honor.

THE COURT: It is not. Is it acceptable to the city?

MR. SCULNICK: Yes, it is, your honor.

THE COURT: I will hear them.

MR. SUSSMAN: Thank you.

THE COURT: When it is your turn at bat.

MR. SUSSMAN: Yes, I understand.

MR. HEFFERNAN: Your Honor, the city in its comments next addresses the lack of one bedroom units as part of the affordable housing portion of developments in the longterm plan.

We propose in our proposed order that there be five percent, I believe, one bedroom units. And the city has provided the court and the parties with certain statistics dealing with the need for such units. Mr. Newman has provided other information.

The government has personally checked with HUD and with the MHA, and there does appear to be a need for these type of units. The question is how much, your Honor. It has been suggested by Mr. Newman that perhaps ten percent is an appropriate figure, and we would have no objection to that, your Honor.

I would, your Honor, like to submit --

THE COURT: Would the NAACP?

MR. SUSSMAN: We have no objection to that as well.

THE COURT: And the city?

MR. SCULNICK: Your Honor, we would urge at least ten percent and perhaps a higher figure depending upon market conditions, but certainly ten percent would be a minimum.

THE COURT: All right.

MR. HEFFERNAN: Your Honor, I would like to separate for a second, though, your Honor, the issue of the need for one bedrooms and whether the statistics show that there is that need, with what I think is very possibly a motivation of the city for requesting this. And I think it is

necessary because of the context in which it was presented and the circumstances of this case.

The first time that we, we being the NAACP and the United States, heard anything from the city with regard to one bedroom units was after the point at which we believed we had reached an agreement on a second decree for the longterm plan.

This was right at about the time when the whole appeal issue came before the court. Prior to that time there had never been any discussion about one bedroom. It had simply been two and three bedroom units. So I questioned the motivation of the city in coming forward with the one bedroom suggestion.

THE COURT: Apart from that, what Mr. Newman is suggesting in his recommendation to increase to ten percent, which is a suggestion that I understand you don't resist, is that as a matter of economics, it simply makes the housing available to a number of people who might not otherwise be able to get any benefit from this order.

MR. HEFFERNAN: I will proceed, your Honor. If I could just say one other thing with regard to that, the city indicates in its paper that at least its research shows that smaller units, one bedrooms, efficiencies, are those which are apparently the most popular in the private market.

I would note that the restrictions in the longterm plan really only apply in terms of bedroom size to the affordable units, and there is nothing that would require any developer who was building units under the longterm plan from putting in whatever size market rate units it felt would sell the best.

And so, one, there seems to be an under-current in the city's papers indicating that the restriction would apply to market rate, and this simply would not be. Nor, your Honor, would I agree that 80 percent market rate units would be overwhelmed to any extent by the presence of two or three bedroom units in the same developments, especially, your

Honor, where they are going to be spatially disbursed throughout the entire development.

We disagree, your Honor, with the suggestion of the city that transfer restrictions, rerental and resale restrictions should be limited to only 20 years. In fact, your Honor, the 30 year figure that was put into the proposed order was also included in the original draft of the second decree that we received from the city, and quite frankly, your Honor, was drawn from specific documents given to the United States and the NAACP by the city emanating from certain townships and cities in New Jersey.

Specifically, Cranberry Township, New Jersey; Bedminister, New Jersey; Rocksbury Township, New Jersey and Mt. Laurel Township, New Jersey, which were the only documents from particular New Jersey cities that dealt with the restrictions, and all the restrictions in there were 30 years.

We disagree vociferously, your Honor, with the city's suggestion that there is no need for an implementation office. We believe it is entirely necessary here because of the obviously complicated and numerous things that need to be done under the longterm plan.

Quite frankly, your Honor, with all due respect to city officials, if we could have relied on officials in the city to have done things quickly and effectively to carry out the housing remedy order in this case already, I don't think I would be here today.

We disagree that the planning officials in the city and those other officials that the city talks about in its comments should be carrying out the functions of the implementation office. We think it is entirely necessary that this office be there, that it coordinates the various city agencies that deal with developers, that deal with negotiations over incentives and other things that are required in the longterm plan.

We also believe that it is necessary that both the fair housing and the long term planning functions be in one office. It is less bureaucracy. The fair housing office is already operating. It has some expertise. We believe that putting it all in one office responsible for overall implementation of this court's remedial orders is something that should be done.

We have provided the court, your Honor, in our revised order with new language dealing with architectural integration, which is Section 6. We believe it addresses the concerns that the city has with regard to what developers may or may not be required to do under the order with market rate versus assisted units. I have not yet heard from Mr. Sculnick as to whether the city deems that acceptable.

MR. SCULNICK: Your Honor, it largely addresses the city's concerns, but I still think that the thrust of the city's concern was that overly restrictive and detailed provisions such as more than eight stories, the top two stories, that that kind of detail isn't appropriate.

THE COURT: With respect to any aspect of this there is the pull and tug between a desire for specificity which gives maximum guidance and an avoidance of rigidity which might in some instances be counterproductive.

MR. SCULNICK: Right.

THE COURT: I think it has to be understood that if at any time there is a proposal which does not literally comply with the longterm plan, but which is consistent with its objectives, and where a pursuasive showing can be made that with respect to that application the provisions of the longterm plan should be modified to encompass it, that such an application can be made.

MR. SCULNICK: Your Honor, I would agree with you. I just want to raise the following concern. I think the tension you describe is accurate, and the problem that the city is trying to address is: Are developers going to be so

overwhelmed by the minutiae of the requirements of the longterm plan that they will be prevented or chilled or dissuaded from proceeding?

And also as a secondary point, your Honor, is that every time the city has to get a modification from the court, I think it puts additional bargaining power on the developer to extract additional concessions from the city in terms of density allowances.

THE COURT: Why doesn't it give additional bargaining power to the city?

MR. SCULNICK: Because the developers' approach will be, we don't have to build this housing. We can walk away, and the city will, in order to encourage the developer, will be over a barrel by having to either give in to the additional economic demands of the developer while at the same time seeking --

THE COURT: Would it help, and I am not certain of the anwer. I am genuinely seeking guidance. Would it help to have a provision in the order containing the substance of what I have just stated, namely that an application may be made to modify the terms in the event that a particular proposal is consitent with the spirit and intent of the order, but requires some modification? Would that help or hinder?

MR. SUSSMAN: I have no objection to that.

MR. HEFFERNAN: Your Honor, I wouldn't agree to modifying the terms of the longterm plan. Obviously to allow for exemptions from certain of its terms, if it was going to result --

THE COURT: Yes. Well, perhaps we should have such a provision, an exemption provision. All right.

MR. HEFFERNAN: Your Honor, the city next comments on some of the specific illustrative incentives that are

set forth in Section 8 of the order. And specifically its comment was with regard to Example 7 and Example 9, and I believe the city's argument states that Example 7, should be modified to only allow for tax abatements on units that are being offered for rental which would be consistent with the tax abatement on real estate taxes to households buying assisted units.

Your Honor, we would disagree with that. We think that the basic premise of the whole incentive section here is that there will be a series of negotiations with developers aimed at coming up with a package of incentives peculiar to any one particular developer which will best enable the construction of affordable housing.

THE COURT: Mr. Newman suggested a modification to that. I don't know whether it has been discussed or not, which is to grant, with respect to Example 7, to grant the owner of multi-family rental housing a full tax abatement on city real estate taxes for the percent of units which are assisted, but not to exceed 50 percent of the total number of units in the development including both assisted and unassisted units.

The benefits of the tax abatement to the unassisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

MR. HEFFERNAN: I have not heard that specific language.

MR. SCULNICK: Your Honor, if I may be heard, let me just express what the city's problem is with this aspect of the proposal.

The city doesn't have statutory authorization under state law to grant tax abatements to market rate housing. All of the state housing finance law provisions relate to giving the city authority to grant tax abatements depending upon the limited

profit or nonprofit nature of the sponsoring entity of the housing or the fact that it is subsidized. They are all tied to the concept that the residents are of low or moderate income, so first we have a problem that the city wouldn't have the statutory power to grant tax exemption to the market rate, you know, portion of the development.

But, secondly, we think it is fundamentally unfair to grant tax abatement to some market rate development units but not others. It seems unfair for the, for a, say, you have got condominium units, and some being market, some are market rate and others are for low and moderate income residents. It seems unfair to require the city to give a tax abatement to the market rate resident of one of those units when down the street another resident of his or her own unit gets no abatement.

THE COURT: Mr. Newman.

MR. NEWMAN: Yes, I just wanted to make some corrections. I don't think that you are fully correct. There is a provision that if you are building a development that has up, 20 percent or more assisted units, the entire development can get a tax abatement.

The tax abatement does not go to the owners or the renters of the unassisted units. Rather, the tax abatement goes to the development to further underwrite the cost of the subsidized units, so that you can get -- quite typically in fact the state asks this in some of its rental programs, that the entire development be given a tax abatement of, say, up to 30 or 40 percent. All the units in it. But that that benefit is applied only to the assisted units.

MR. SUSSMAN: People are confusing two things, Judge. I think Mr. Sculnick was talking about condominium which are for-sale units which relate to Example 9.

THE COURT: 9.

MR. SUSSMAN: And we are trying to focus here on Example 7 which is what Mr. Newman is talking about. Abatements on rental housing, multi-family rental housing. I think that is the problem we are having.

THE COURT: All right. Let's move on

MR. HEFFERNAN: Again, your Honor, the important thing in all of this is that there is supposed to be a negotiated package. It is supposed to be the package that hopefully is going to result in the most affordable housing at the best cost, and I think that is something that has to be given overall consideration.

Your Honor, on the issue of the affordable housing trust funds, we have modified the language in Section 9, I believe, consistent with the wishes of the city.

MR. SCULNICK: That's correct.

MR. HEFFERNAN: Lastly, your Honor, we have added a sentence at the end of Subsection A in Section 2, which the United States and the NAACP believe is directed toward the problem of possible concentration of units in any particular area of the city.

THE COURT: Would you have any problem with the following changes to that? Where it says, "to avoid the undue concentration of assisted units," just to make clear, to read, "so as to avoid the undue concentration of both public and assisted units."

MR. SUSSMAN: No.

MR. HEFFERNAN: No, your Honor.

THE COURT: All right, and to add a sentence which would say, "Priority will be given to longterm plan proposals which avoid such concentration."

MR. SUSSMAN: That's fine.

MR. HEFFERNAN: I have no problem with that, your Honor.

THE COURT: All right.

MR. HEFFERNAN: Your Honor, I would like to make a point, though. The reason for at least the United States and I believe the NAACP not making this more specific, we think is a valid one. While there is concern as far as the public housing portion of the remedies, concern by certain people of concentration in southeast Yonkers, your Honor, we don't believe that that should be a real paramount consideration in terms of the selection of sites for the longterm planned units.

To begin with, your Honor, we do not believe, the United States does not believe that there is an over concentration of public housing at least in southeast Yonkers, but, if you look at the numbers involved in the longterm plan, your Honor, if there is any priority given, and the reason we didn't include this, if there is any priority given for units outside of southeast Yonkers, you are basically talking about placing as many of the 800 units as possible in the northern portion of the city because we have already pretty much ruled out southwest, and I think we need to take that into consideration.

THE COURT: Obviously, you get to a point, you are dealing here with a much greater number of units. You get to a point where to achieve a uniform dispersal you come back to an area which might previously have been viewed by some to have a higher density.

Obviously, the goal here is a sound planning, good housing, and maximum uniformity in the dispersal throughout.

MR. HEFFERNAN: My only point is that given the emotion and controversy which has characterized the reaction to the placement of the 108 units in southeast Yonkers, I think one has to step back for a second and look at the plan as a

whole, and not allow the emotion of the moment to cloud your vision as to what is going to happen down the road.

I certainly don't think that, I know again, your Honor, we don't believe the concentration of public housing is too great in southeast, but I certainly wouldn't want to see that result in over concentration in other parts of the city.

THE COURT: But you have no problem with the language I have suggested?

MR. HEFFERNAN: No, your Honor.

THE COURT: Mr. Sussman?

MR. SUSSMAN: Thank you, Judge.

Judge, in many ways the adoption of the longterm plan is at least for the NAACP, as historic an occasion, as adoption of the consent decree. We may not have quite the degree of unanimity, and it is likely, given the political realities that the City of Yonkers will take an appeal from this, and I am a well aware of that, but--

THE COURT: It is by far the most important aspect of the housing remedy.

MR. SUSSMAN: I was going to say that.

THE COURT: It has generated less emotion, and that is what I meant earlier when I said that there has just been an inordinate focus of attention and controversy on the public housing aspects. This involves far more units and far greater opportunities.

MR. SUSSMAN: Yes, and thank you for saying that. That is the point I was driving at, and, I think, a few other general comments.

One thing that we all have to recognize today is that whether we have the implementation office or not, and I am certainly hopeful we will, this program for its success does depend heavily, and this should not be lost sight of for one moment, on the cooperation and implementation of the city. And that is true with regard to, as the court has previously observed with its development experience in this area of housing, its signalling effect of the city and its agencies' action and also, of course, in the review process.

Now to be realistic, this could cut one of two ways, and I am always pessimistic, but I am not convinced, frankly, of how it would cut. That is why the office of implementation is very important.

The city says in support of its position that there should be, for example, no 20 percent goal, that it has a great incentive to have the housing built, so of course it would want to try to maximize in any given case the goal, but, of course, one could turn that around and say, as a skeptic would, that the greatest incentive is to have nothing done and therefore to negotiate with developers and to send the wrong signals is in as much its interest and political interest as anything encouraging would be.

I think we really do have to take the history and politics into account in fashioning an appropriate remedy order here.

THE COURT: You are addressing what?

MR. SUSSMAN: The implementation office.

THE COURT: The existence of an office.

MR. SUSSMAN: The existence of an office separated from the city politics at least somewhat separated and that the officer, executive director would report to this court. There would be a requirement as there is in the May 28th, 1986, order that that office report to this court about accountability in terms of the city.

One could say, well, that is not needed because there is great incentive on Yonkers to hasten and get this done, and all I am suggesting is past history does not counsel in my judgment for that argument. It counsels to the contrary, that the vicissitudes of the moment may well control what occurs more than the imperative to get housing done expeditiously. And we do need a motor or mechanism to insure that results occur regardless of those vicissitudes.

Now one other general comment I do want to make, because it has some relevance, I know, to the Yonkers community. Initially, Judge, we had thought, and I know it is represented on the record of January 25th, that there would be agreement on a long term plan, and that the agreement would then be subject to a fairness hearing. I raise this particularly because I know in the community there are some who have argued that the NAACP then sabotaged the effort to get agreement so that we wouldn't have to subject this to a fairness hearing.

Because there are people in the minority community who don't agree with it, and they would come to the fairness hearing, and they would object. I do want to make very clear several points.

First of all, to date I have received no substantive comment, although I have circulated this document in the community widely. I have received no substantive comment from anyone critical of any provision herein, and I have attempted in the negotiations even in a sense the negotiations here with the Justice Department to insure that southwest Yonkers is not slighted in this agreement or this order, and the way that is done is through this credit provision, and I do think that is important.

And I want to articulate for the record why it is important. The major purpose really here of the NAACP is to provide a diminution in racial identifiability in the City of Yonkers and to have areas of Yonkers that have long been essentially dumped

on for all the assisted housing treated in a sense on a par with other areas. Now that has to be viewed with the other goal of, of course, forwarded racial integration and the opportunity for racial integration throughout the rest of the city.

We believe the bulk of this decree and this order relates to getting that housing outside of southwest Yonkers for people who under the tenanting priorities have been denied that opportunity since 1971. A long period of time. But we also believe that the City of Yonkers in implementing this decree, and we feel strongly about this, ought to essentially treat the city as one, meaning that where a developer comes who is interested in building in southwest Yonkers, that developer should have available to him or her those incentives which are alluded to and laid out by example in, I believe, Section 8 of this decree.

In other words, we are willing to give credit, and that is what is done here for up to 200 of the 800 units on a one-to-two basis, meaning for 400 units of assisted housing all together constructed in southwest Yonkers. So to insure that people in southwest Yonkers who do want to remain there have the opportunity to live in 80-20 housing in that area of the city. We believe that principle of equality of treatment should be abided.

Now I do want to make one point clear. There is no requirement in this decree that the city so act. There is an option that the city act in that way. The city may say publicly to developers, we are not going to make any of these incentives available in southwest Yonkers. We are going to make them all available, and all the units will then be developed outside of southwest, the other three quadrants. The NAACP hopes very strongly that the city does not take that position.

It rather takes the position that treating all sections equally is important, and producing market rate housing in southwest Yonkers is a step towards racial integration in that section of the city; and that is what this decree embodies.

Now let me just make a few other points. Let me address the question that you raised about the areas where there is a 60 unit per acre by right, and would it be realistic there to state that ten percent of the units were to be subsidized with a 50 percent maximum density bonus, if I understood the example properly.

THE COURT: Yes, sir, you did.

MR. SUSSMAN: I think, your Honor, that that would be, especially if it were written into the decree in that form counterproductive. This is the reason: If one studies the zoning map in Yonkers there are not that many areas, undeveloped areas remaining available to developers zoned in that manner.

Now I believe that those, where there are areas zoned that way, to the extent it is consistent with the surroundings, and that obviously has to be dealt with not abstractly but on a case-by-case basis, it should certainly be encouraged to put the maximum number both of units to the extent it is appropriate with regard to planning, and the maximum number, that is, 20 percent of assisted units, and not put in a predisposition to decrease either the number of units that could be built there or the proportion.

And the reason for this is that realistically 4,000 units in a city of Yonkers' size, which is of course what we are talking about, is a large number of units.

Now there is of course a constraint here, and that is whether from a planning point of view in any given case, the maximum density bonus added on to what has already a density, that is 60 per acre, is reasonable. But the fact of the matter is that, and I know of specific locations, take Schaffer Slope for example as a location, in which developers have already come forward and stated that they might very well be willing so to proceed in an area that has a high density.

And I don't think in those cases we should discourage that density because it will get us toward the goal in an efficient way.

So I oppose that kind of provision. I think to use the city's argument, it is overly restrictive and will really take away from their discretion. I do not oppose an operation which satisfies, as the court has said, in the exemptions provision which your Honor suggested, which would allow an interpretation for the city to come and seek modification in given cases where a development proposal is promising and economic analysis shows that 20 percent is simply too much. It can't be reached.

And I think a general provision would cover that case and maintain the integrity of the governing principle of 80-20, which should clearly be the governing principle even in dense areas.

Let me just make a couple of other specific points. We have no objection to the ten percent single or bedroom, and also just to make clear and come part way to where Mr. Sculnick is on that --

THE COURT: If you make that change to ten percent, then do you change in the second sentence, do you change the 65 percent to 60?

MR. SUSSMAN: Yes.

I do think, Mr. Sculnick, and I will put this on the record here, that if in fact it turns out upon the tenanting process that the office of implementation engages in, and that is the screening process of those who would be eligible, that the demand for these one bedroom units far exceeds that and appears that it would meet a need which is identifiable, we don't have an abstract objection to that, but I do feel that with the knowledge I have of the market at this point, that those in need would not justify inclusion of more than ten percent now.

But I think that is essentially an empirical issue. I believe with Mr. Heffernan, unfortunately it has become somewhat ideologicalized because people have screamed that they want one bedroom, and they see that as not having minority children, but apart from that, the point is empiricism should ultimately guide us because it is in our interest to have those needs met rather than ourselves adopt a priority presumption that some people have the wrong reason for supporting that, there is not perhaps a good reason to support it.

I want to speak briefly, your Honor, about the transfer restriction. The city's argument being that the 20 year rather than 30 years is appropriate. I think frankly the extent of the violation here and the duration of the violation should be a guide the court uses analytically in deciding that question, apart from the New Jersey precedent, the Massachusetts precedent where the restriction is 40 years.

I think in a case like this where you have such a longstanding violation, where you have such a longstanding violation that it certainly would be inappropriate to use a tenant term which is the least that anyone has ever thought of. That seems to me incommensurate and it oughtn't be adopted.

Finally, let me say a word, your Honor, about the implementation office and the functions of that office and why we believe it is so critical.

Apart from the reasons I mentioned before which is the skepticism, the issue of fair housing in Yonkers and the provision of fair housing is inextricably tied to the creation of supply. What we have seen with regard to the Section 8 existing program unfortunately apart from the rent levels which may be too low is that there is simply apparently not the supply of rental housing which will allow minorities to really significantly expand housing opportunities. So, therefore, the pursuit of fair housing is clearly tied in with the provision of new housing.

And really in providing and marketing that new housing we should have a very close interrelationship between the office of implementation and fair housing. And it seems to me sensible to have fair housing be part of the office of implementation's overall effort, and if we were in a situation where there was a great deal that could be done in fair housing in terms of getting people actual housing through fair housing actvities in the market, it might be a different situation.

But it seems to me here, the experience is that the new supply is going to be critical to expanding fair housing and housing opportunity. I think that counsels for the office's inclusion.

Maybe one other point. Let me just quickly review this. Yes, the last point just again for the record, Section 5 which is a very important section dealing with the fostering of home ownership, which I know is one of Herman Keith's major points in the community and has been since he was president of the branch, I do, though, want to emphasize the important point, and it is in section 5 that no proposed housing development containing assisted units shall in any way be disfavored in negotiation if it is going to be rental.

I think that is important, though we do favor home ownership. We do believe there is a substantial constituency that itself would like rental housing, and from the point of view of the market, rental housing may be coming back for persons in this income range, so we don't feel, and we want to emphasize, that there should be any disposition against that.

THE COURT: Mr. Sculnick?

MR. SCULNICK: Your Honor, there are basically two groups of issues addressed by the plaintiff's motion. If first deals with the specific aspects of the longterm plan as to which the city has made suggestions for modifications, and the second deals with the responsibility for implementation.

I would like to make it clear that the city did not request a change in the 80-20 basic concept. Our brief asks for a variance procedure, and I think that both the plaintiffs have suggested that we are trying to change the essential requirement of 20 percent assisted, and that isn't what we asked for.

We suggested that there should be a variance procedure, and I think that there has been enough discussion about the appropriateness of some kind of a procedure by which a variance is obtained. The key question then is who makes that decision? And that, I will address that in the implementation office part, because I think the question is how does that variance procedure get accommodated? Does it always have to come to the court, or is there going to be some procedure short of an application to the court where that variance can be provided?

THE COURT: Are you using "variance" saying variance synonymous with exception?

MR. SCULNICK: I am saying variance in the commonly used sense of the word as in zoning variance. Yes. In fact, when I made that suggestion it was in the context of drafting the zoning ordinance that will be the overlay that the developer is going to read and see. How am I supposed to make a proposal for 80-20 housing.

Although the city acknowledges the outside housing advisors' suggestion with respect to the 60 units per acre and over, and concurs in that, the analysis and the reasoning behind that, I think it goes to the broader issue, and that is that it really is a site specific question as Mr. Sussman says. It is an empirical question, and that is somethng we agree with. I think that is going to be a question of how a developer on a specific site makes a proposal, and the only point we were trying to make is that the developer should be able to apply for a variance from the 20, and there should be some mechanism for assessing the validity of the developer's contention that less than 20 percent is necessary to make the proposal feasible.

Essentially I agree with the contention that how many one bedroom units is an empirical question. In fact, in our brief, I stopped short of suggesting a specific number because the very point is we don't know what the right number is.

I think that we are in the right direction by agreeing to a ten percent figure, and I think the suggestion of the NAACP that should experience suggest that is an inappropriate one, that modification can be obtained.

I think the question on tax abatements really is going to require additional study of what state statutes provide. I am not familiar with the provision to which the outside housing advisor has referred, which would permit abatements as to market rate housng, but I will just have to look into that further.

But that issue, I think, needs to be resolved, but fundamentally the city makes the point that it is unfair to grant tax abatements to market rate units which are part of an 80-20 development where a similarly situated resident of Yonkers is going to be paying full taxes on another unit.

We have discussed the architectural integration, and about the only other technical issue then is the 20 and 30 year, and I think there we recognize the remedial nature, the arguments made by the plaintiff as to the remedial nature of it, but I have been advised by the Abeles Schwartz experts that in fact the New Jersey experience favors the 20 years, so again that is a question that is hard to resolve on the merits, but we would urge the shorter one as being a provision which more likely will encourage developers to come forward with proposals.

Turning to the implementation office, the city submits that the city's department of planning and development is the proper office to have responsibility for implementation. It has the expertise and the staff. It will by necessity be involved in every step of a development process as it relates to zoning, environmental impact and assessments, traffic, utility studies.

There is no way that any development will go forward without --

THE COURT: I don't believe there is any concept that that would not be the case. Unless there is full cooperation and coordination with the city planning and development office there is going to be a very bad situation here.

That really isn't the issue. The issue relates more to motivation, and there is certainly a basis in the record for concluding that the city planning office, planning and development office having great expertise and skill, is nevertheless very much subject to the political influences of the city.

I say that not in any way to disparage the head of that office, whose skill and expertise I have had a great deal of opportunity to observe, but simply to recognize the history of that office and its relationship to the city.

MR. SCULNICK: Recognizing that concern, the city submits that notwithstanding that, the issue is one of responsibility, an issue, a subject as to which this court has frequently lectured the city.

And the point I am trying to make is that if the city is to have --

THE COURT: To very little avail. Frequently lectured the city, but to very little avail.

MR. SUSSMAN: Not frequently enough.

THE COURT: I think my status as a professor would be very much diminished if my success at my lectures in US v. Yonkers was the criterion.

MR. SCULNICK: Notwithstanding that, I think that the key point is that the city is going to be responsible for insuring the success of this plan, and we suggest that the way to

identify the responsibility is to make an existing city official responsible, and in that way there will be no duplication or overlap or turf battles. There will just be no question who is responsible.

And that is a powerful suggestion, I submit, your Honor, because recognizing the history of this case, to which you aver, if that responsibility is placed in an office directly responsible to the city manager, I think that has the long range hope of providing the maximum opportunity to assume that responsibility to which the court has so often referred.

Thank you.

THE COURT: Mr. Dudley?

MR. DUDLEY: Thank you, your Honor. The school board has a limited interest, your Honor, in the longterm plan, limited interest, but I think an important one from this standpoint, and that is that the construction of 4200 units of housing, 200 units of public housing and 4,000 of market rate and subsidized is likely, it seems to me, to have a significant impact on the school district from the standpont of the additional number of students that would be added to the school district, and so we want to make certain that when that takes place, the school district will have facilities which are adequate to accommodate the additional number of children.

Also, we do have an interest in getting projections, I think, regarding the likely racial and ethnic composition of those students, because I think that could have an impact on the school desegregation plan and the efforts that the school district has engaged in.

THE COURT: Somewhat anticipating that point although not particularly with respect to the ethnic and racial composition, because there may be some problems with respect to obtaining that information with respect to housing applicants, and Starrett City, and that whole complex of concerns.

Let me see whether the following language would obviate your concern. "As specific plans are formulated for the construction of additional housing, projections as to the number of school-age children likely to reside in such housing shall be furnished to the school board.

"The school board shall advise as to the capacity of the existing school system to accommodate such additional children, whether any expansion of faclities in certain locations will be required, and the impact if any of such changes on the school board's ability to comply with the educational improvement plan."

Would that meet your concern?

MR. DUDLEY: It is a major step, I think, in the right direction. It does seem to me that there ought, it ought to be made clear who is to provide these projections, because I think the--

THE COURT: Who would you suggest provide the projections?

MR. DUDLEY: Well, I would assume that in the case of the public housing, MHA and HUD, and, I would assume, the outside housing advisor given his expertise would have information.

THE COURT: Let's focus on the longterm plan and not the 200 units. That is the last think that I want to tinker with.

With respect to the longterm plan, I don't know, frankly, whether the projections would be furnished by the developer who has done the market analysis or by the planning commission or whoever. It seems to me that it would be a mistake to attempt to be too specific, which is why I suggested that language. Would you like to hear it again? Or do you have it?

MR. DUDLEY: I think I have it, and I considered it, that question myself, your Honor, when I drafted, so I proposed language and circulated it because I am not sure either. I don't know whether the city and the MHA would get it as a result of dealing with the developers. I just don't know.

THE COURT: It should be clear, however, that before the process is completed, and the project and the construction approved, that process must take place.

MR. DUDLEY: I agree.

THE COURT: And I think that that is what I meant to include in this language.

MR. SUSSMAN: We have no objection.

MR. DUDLEY: As I say, I do think that it is also in everybody's interests, the court and all of the parties, to get as much information in advance as we can get regarding likely racial and ethnic composition.

THE COURT: The phrase, the impact of any such changes on the school board's ability to comply with the educational improvement plan, I think, covers that.

MR. DUDLEY: Thank you, your Honor.

THE COURT: Is there anything further? The court will take a five minute recess.

MR. HEFFERNAN: Your Honor, one question, your

Long Term Plan Order (Sand, J., June 13, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH -- NAACP, *et et.*,	)	
	)	80 CIV
	)	6761
Plaintiffs-Intervenors,	)	(LBS)
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
	)	
Defendants.	)	

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating to the implementation of the long-term Goal[1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further

---

[1] All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the Court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this Court to enter their proposal. Having reviewed these submissions, and the response of the City thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17 (a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development. In instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described in clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such Section does not exceed the number of assisted units allocated to households

described in clause (b) of such Section; and (iii) to households described in clause (d) of such Section does not exceed one third (rounded to the nearest whole number) of the number of assisted units allocated to household described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total number of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units may be one-bedroom.

SECTION 2. *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses, or townhouses) located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Implementation (see below) and the City shall seek, to the extent possible consistent with the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently zoned MG, M, A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

SECTION 4. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 of the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of the purchase, in the same income group (referred to in Section 15

of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of judicial decree of divorce or separation agreement (not including transfers to third parties), (ii), the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. { 960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and

submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

SECTION 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the foregoing, no proposed housing development containing assisted units shall in any way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process solely because it proposes to offer assisted housing units for rental rather than for sale.

SECTION 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

---

[2] Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

SECTION 7.

Staging. Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

Percentage of Market Rate Units Receiving Certificates of Occupancy	Percentage of Assisted Units Receiving Certificates of Occupancy
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

SECTION 8. *Mandated Incentives.*

Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatements to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated tohouseholds in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units beingconstructed to be used to skew the monthly payments of the non-

assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9 depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed on the AHTF as previously directed by this Court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) in (i) site-improvement projects (i.e. site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall such funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.*

The City may provide (on a project-by-project basis, on an area-wide basis or otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the assisted housing goals set forth in either clause (b) or (c) of Section 15

of the First Decree for every two units of assisted housing (allocated to households in the income group for which credit is claimed) constructed in such areas, up to a maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.*

(a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to implement such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation office shall not exercise the power of other City agencies. Moreover, the

administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing Office shall be responsible for formulating and presenting for approval and funding a budget for such office, as well as for the hiring and firing of the employees of such office.

SECTION 12. *"Section 8" Certificates.*

The City shall consider in good faith any plans for assisting eligible families in utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

/s/LBS
Leonard B. Sand, U.S.D.J.

Date: (6/13/88)

Resolution of Yonkers City Council, Adopted June 14, 1988

ADDENDUM B

RESOLUTION NO.144-1988

BY VICE MAYOR SPALLONE:

WHEREAS, recent on site inspections of Federal and State funded housing projects in the City of Yonkers reveal serious violations of law, including violations of:

Health Codes

Safety Codes

Building Codes

Fire Codes

Environmental Codes and

Sanitary Codes, and

WHEREAS, such inspections also reveal serious drug related activities that are reducing the living conditions of tenants to a condition that could best be described as bordering upon a sub-human state, and

WHEREAS, the presence of human waste is found in almost every basement and hallway in existing public housing projects and defies imagination and the impact upon air quality in these areas is sickening and the threat of disease and infection upon the community is everywhere, and

WHEREAS, garbage can be found in hallways, courtyards, stairwells, parking areas, elevators and playgrounds, and

WHEREAS, in addition to the above, broken fire doors, windows, elevators, hallway lighting, asbestos violations are common conditions that affect the residents of these areas, and said fire violations present further hazards to safety and welfare of tenants and their families, and

WHEREAS, park and playground areas in these public housing complexes no longer function as recreational areas for children and adults, and appear comparable to bombed out areas of Europe and World War II, and

WHEREAS, no further housing developments should be commenced until the present estimated 2500 units are preserved, and

WHEREAS, unless the aforesaid 2500 units are given immediate priority in terms of addressing the monstrous violations of sanitary, safety and environmental codes, the inhabitants will be added to the scores of homeless in our City.

NOW THEREFORE, BE IT RESOLVED, that this City Council requests and authorizes an immediate investigation into the conditions of the present public housing complexes in the City of Yonkers and the quality of life existing therein by the appropriate Federal, State, County and City Agencies, and

BE IT FURTHER RESOLVED, that the City Council impose a moratorium on the building of all Federal and State funded public housing development in the City of Yonkers until such time as the results of the above requested investigations are known, and until the violations referred to above are corrected, thereby at the very least, making the quality of life of the aforesaid inhabitants tolerable.

ADOPTED: JUNE 14, 1988

ALOYSIUS MOCZYDLOWSKI: CITY CLERK

This it to certify that the foregoing is a true
and correct copy of the record on file with the
City Clerk, City of Yonkers, N.Y.

CITY CLERK
Yonkers, New York

Letter from Brian Heffernan, Esq. to Michael Sculnick, Esq., Dated June 20, 1988

U.S. DEPARTMENT OF JUSTICE

Civil Rights Division

WBR:JAM:BFH:tas
DJ 169-51-22

Housing and Civil Enforcement Section
P.0. Box 65998
Washington, DC 20035-5998

P K K & D
Jun 20 1988

Michael W. Sculnick, Esq.
Vedder, Price, Kaufman, Kammholz and Day
1 Dag Hammarskjold Plaza
New York, New York 10017

Re: United States and Yonkers Branch NAACP v. Yonkers Board of Education, et al., 80 CIV 6761 (LBS)

Dear Michael:

It has come to our attention that, on June 14, 1988, the City Council of Yonkers adopted Resolution No. 27, as proposed by Vice-Mayor Spallone, authorizing an investigation into certain public housing conditions in the City of Yonkers and imposing

> a moratorium on the building of all Federal and State funded public housing development in the City of Yonkers until such time as the results of the...investigations are known, and until the violations referred to...are corrected...

We are hereby requesting in writing from the City of Yonkers its position on whether this resolution is intended to apply to the public housing which is the subject of the Housing Remedy Order and the First Remedial Consent Decree in Equity in this action. I would appreciate a response to this inquiry within 14 days. If the City is not prepared to so represent its position in this matter, we are prepared to move the Court for more formal proceedings at which the City can explain its actions.

Thank you for your cooperation.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By:

Brian F. Heffernan
Attorney
Housing and Civil Enforcement Section

cc: Judge Leonard B. Sand
All Counsel
Oscar Newman
Peter Smith

Minutes of District Court Proceedings (Sand, J., June 21, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

80 Civ. 6761 LBS

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiff-Intervenors,

v.

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

TELEPHONIC CONFERENCE June 21, 1988
11:15 a.m.

Before:

HON. LEONARD B. SAND,

District Judge

(The Court, Brian Heffernan, Michael Sussman, Michael W. Sculnick, Raymond LaRizza, and Oscar Newman were all telephonically connected)

THE COURT: I received a letter from Mr. Heffernan dated June 17, which I will mark as Court Exhibit A of June 21st, in which he requests that the Court specify a time for the City of Yonkers to comply with Section 17 of the consent decree, which calls for the adoption of legislation within 90 days from the date of the consent decree.

Mr. Sculnick, do you want to respond to that letter?

MR. SCULNICK: Yes, I would like to, your Honor, and I would like to suggest a schedule for the preparation and adoption of that ordinance.

THE COURT: Yes.

MR. SCULNICK: My firm has retained the planning firm of Abeles Schwartz Associates, and I have been working with two principals in that firm, Peter Abeles and Paul Phillips. Their experience includes a considerable amount of experience under the Mt. Laurel litigation, and I think that they have the background and qualifications to help in the preparation of the ordinance that is envisioned under the consent decree and a long-term order.

Neither I nor other people in the city have the background and experience to draft that legislation, so we thought it was important to get that outside consulting experience.

THE COURT: When will they have completed their efforts?

MR. SCULNICK: I believe that we will have a draft to circulate to the parties three weeks from June 28th. The reason for -- why don't I just say that we'll have a draft by July 19th to circulate to the parties and that however much time the plaintiffs and the outside housing advisor wish to have

to comment and make suggestions on that from which we can then present a final draft to put on the next city council agenda for consideration.

MR. SUSSMAN: Is there a city council meeting in August?

MR. SCULNICK: I'm not sure, Michael, I don't know.

MR. SUSSMAN: I am not sure there is.

THE COURT: Let me tell you the concern that I have. The concern that I have is that we wait until August, and then the city council, which acts in unpredictable ways, doesn't pass it, in which case we will have gone some three months for little purpose, and I'm wondering whether there shouldn't be a two-step process here, and that is a resolution by the city council expressing its willingness to adopt the legislation when the Abeles Schwartz third-party review has been completed and scheduling the matter for the mid-summer meeting of the city council.

Do you have any problem with that, Mr. Sculnick?

MR. SCULNICK: Yes, I do, your Honor. I think that, predictably, the city council would view such a request without the detail of the legislation very unfavorably.

Your Honor, I very much appreciate your concern that the council acts in unpredictable fashion, but I think prior experience is that where they are presented with what they would view as a blank check or none of the details or or specifics, that their reaction will unfortunately be much more likely to be negative, and, therefore, I don't see that as a productive approach.

THE COURT: Of course what I'm responding to is the fact that on the very day the Supreme Court denied certiorari, and after there had been expressions by elected representatives

of Yonkers of recognition of responsibility and cooperation, that the city council passed a moratorium on all public housing.

Now, I'm not sure that it is appropriate that that moratorium remain in effect until August, but what are the views of the parties on this?

MR. HEFFERNAN: Well, your Honor -- this is Brian Heffernan -- I sent a letter out on Friday to Mr. Sculnick, and from a discussion with your chambers it appears that the letter was inadvertently left out of the package you got, which also had the letter that we are discussing today to you. I asked Mr. Sculnick, within 14 days, to indicate to us in writing whether it is the city's intention that the moratorium applied to the housing which is the subject of the consent decree, and we will consider our options in that regard as soon as we receive a response to that request.

MR. SUSSMAN: Your Honor -- this is Mike Sussman -- just a couple of points: First of all, I think that -- and I said this to Brian Heffernan privately -- I don't feel that the city council's resolution is anything but a symbolic gesture, and I don't think it has any practical impact -- I mean, I think it is rather dastardly, but at the same time I don't think that it should be taken seriously on any level.

But, more to the point on what we're talking about now: It seems to me that the notion that there are a large number of details that Abeles and Schwartz must work out and that must precede the city counsel's consideration is just faulty.

The second remedial decree contained, frankly, so many details, the council has never adopted that, and indicated to Abeles and Schwartz that Abeles and Schwartz was simply to draft legislation embodying that, with Mr. Schulnick's help, and I think they can do that tomorrow. I don't think they have the will to but they could do it. I don't think they need more detail to act.

It is a very detailed document, as I'm sure the court is aware. It already settles the large, large number of questions, substantive questions which have to be dealt with.

Now, translating that into legislative form may be somewhat time consuming, but I think we should get a closure on this and know whether the city council is going to be supportive, and if they are not, then I think you are correct, we are going through an exercise which really is pointless.

MR. NEWMAN: Given that Abeles Schwartz has the experience in drafting such legislation and given the point that Michael made, which is a very good one, that all the fundamental issues have already been resolved in the second consent decree in the long term, why is it that they can't have that document ready in a week, even as a draft, for all of us to look at? I'm surprised, in fact, that it is not in our hands now.

MR. HEFFERNAN: This is Brian Heffernan.

Your Honor, I mentioned to Michael Sculnick yesterday, it is my understanding that Abeles Schwartz has been retained for a couple of months now, and initially it was my understanding that they were retained for the specific purpose of dealing with the legislation regarding the long-term plan.

While it is true that the long-term plan was not entered until a week and a half ago, certainly, based on the negotiated second decree, which was never entered, it certainly could not have come as any surprise to the city that the long-term plan as eventually entered was very much like that. As far as we're concerned, the specifics of that plan have been on the table for quite a long period of time.

THE COURT: What I would like to do is have another call placed as soon as possible with either Mr. Abeles or Mr. Phillips also connected, because I would like to --

MR. SCULNICK: Your Honor, Mr. Abeles is supposed to be back in the office later this afternoon. Mr. Phillips is out of the office this entire week.

THE COURT: What time this afternoon?

MR. SCULNICK: I should be able to get Mr. Abeles sometime this afternoon.

MR. NEWMAN: Have they started working on that draft of the legislation, as yet, to your knowledge, Michael Sculnick?

MR. SCULNICK: I don't believe they have started drafting--

THE COURT: Let's -- I want to take this up directly with Mr. Abeles, and what time do you think we could do it.

MR. SCULNICK: Why don't I call chambers. Why don't we plan on 3 p.m., and if there is any change from that I'll contact the parties.

THE COURT: All right. Let's do that. I think it would be much more -- instead of us speculating as to what will Mr. Abeles has or has not done, why don't we hear directly from him, and then, if there are any directions to be made with respect to when it is to be ready, they can be made directly to him. So let's do that again in another phone call at 3 o'clock.

Does that create any problems for anyone?

(All counsel indicated negatively)

(Adjourned)

THE COURT: Please speak loudly and clearly and identify yourself before you do anything else.

Mr. Abeles, as you have probably been advised, had a telephone conversation earlier today in which there was a discussion of when there could be presented to the Yonkers City Council a resolution of the sort called for by Section 17 of the consent decree and we were told that you were working on legislation to implement the long-term plan.

Mr. Heffernan then, on behalf of the Department of Justice, raised the question of how much was required for at least an initial resolution by the city council in view of the detailed nature of the long-term plan.

My first question is where are you in the process of drafting the legislation envisioned by the consent decree and the long-term plan.

MR. ABELES: The person in this office who is directly responsible is on vacation this week, that's Paul Phillips, so the information I can give all of you is based upon my conversations with him and not being directly involved. With that as a preface, where we are is as follows: We have looked at the land inventory of Yonkers. We have obtained information as to land value, development costs, current market conditions.

It is anticipated that with the background that we have developed that early next week we will be meeting with the planning people in Yonkers, together with the attorneys, and perhaps others, to advise them as to what we believe to be some of the important features of a zoning ordinance which is intended to implement Section 17, which is workable.

It is my anticipation, but not necessarily Mr. Phillips', that from that period of time it would take three or four weeks to draft the ordinance which would then be brought before the Yonkers authorities for their action.

THE COURT: All right. That's helpful. Now, my question is this and that is whether we can't do this in two bites, that is, have a first resolution, which is essentially an

adoption in the form of a city council enactment of the relevant provisions of the consent decree and the long-term plan, with the understanding that the detailed zoning resolution, such as you've just described, will be enacted approximately a month thereafter.

To be perfectly frank, my concern, and I'm sure as the professional it should be your concern as well, is that we don't face the situation of all the work being done and then we come to some point in mid or late August and it's presented to the Yonkers City Council, which fails to adopt. And I do this, as I said earlier today in a conference that you were not hooked in on, in the light of the fact that last Tuesday the Yonkers City Council passed a resolution which I think surprised many people and which would seem to be inconsistent with all else that is going on.

MR. SCULNICK: Your Honor, this is Mike Sculnick. It appears to me that whether or not the council were to vote on this preliminary resolution that you suggest, all of the work that's necessary to draft the zoning ordinance would be required in any event.

THE COURT: Yes.

MR. SCULNICK: It's not true that any time will be saved.

THE COURT: Well, a few things will happen. First of all, it will clear the air in Yonkers, in other words those who are under the impression that the everything is on a standstill because the city council has declared a moritorium, we'll understand that that is not the operative state of facts and, second of all, it will be a further commitment on the part of the city council to go forward with implementing the long-term plan.

Now, if anybody has some other suggestion or mechanism to accomplish those results --

MR. NEWMAN: I would like to ask a question of Peter Abeles. I'm curious why you have to wait this long to produce an ordinance. The ordinances are in place in many towns in New Jersey. I'm sure you have copies of typical ordinances. You know the range of mechanisms that will be required. I'm sure you will want to make provisions for a good many more so that depending on the situation a developer can pick and choose.

Why is it that we have to wait five weeks? You see. It gets us then into the summer. The Yonkers people don't meet in August and then we're into September.

We would like to also, that is to say plaintiff and all parties, would like to take a look at the ordinance before the city council passes it. Isn't it possible to produce something more quickly that we could all look at and respond to?

MR. ABELES: Two questions, let me respond to the latter one first and then to the first. From my perspective, it would be helpful that as we move forward from next week on to when we believe we will have the document, that if we could have your views as it's being developed, based upon what we have learned in the last four or five weeks, that will be helpful.

I believe if we can exchange such views and information that will probably reduce the differences that we might have at the end of the process.

Since I understand it's everyone's interest to move as expeditiously as possible, that kind of intercommunication --

THE COURT: Let me interrupt. I want to make it clear and I don't mean to sound pompous. So there's no ambiguity, it's a direction of the court that before there is any submission to the city counsel of a resolution in which it is to vote, that is to have been previously furnished to the court and to the parties, I say that because there was one previous episode that we don't have to react, but it leads me to make that in the form of a court direction.

But let's come back to what I was saying before. I would think that within a matter of a few hours the consent decree and the long-term plan could be put into the form a preliminary city council resolution and the question is whether that serves a purpose. Mr. Heffernan, what's your view on the matter?

MR. ABELES: This is Peter Abeles. I think by answering Oscar Newman's first part it may assist the court in evaluating the need for the time that we are using. The experience that we have had in the State of New Jersey, going back to 1974, with the original Mt. Laurel case up to today, has indicated to us that in order to make an inclusionary ordinance workable it is important to understand what are the economic, land use and marketing factors in that particular community.

One reason I believe that professionals in the field feel that it's relatively simple to produce a sound Mt. Laurel type ordinance, is that most of the early ordinances were produced in situations at the periphery of the metropolitan area where there was a great amount of land and any zoning changes made on behalf of producing inclusionary zoning produced very important and valuable economic results.

As we have moved towards the more built-up situations and away from the traditional out of ring suburbs we find that the formulae developed over the last ten years often do not produce what we hope to produce and the problem that we confronted and found in Yonkers is that one has to tailor an ordinance really on the land use facts, the market facts, the economics of development in order to make an ordinance which will work.

To put together an ordinance based upon the traditional Mt. Laurel ordinance, as you had in the outer county, I believe may give you an ordinance which will not achieve the result in court, the plaintiffs and hopefully the defendants are interested in.

MR. SUSMAN: Your Honor, I'm a little concerned, frankly, that we don't start here and in the next four weeks relitigating issues that have essentially been decided in the process of developing the long-term plan and I think that the court a moment ago said it would take a few hours to translate the long term plan that has been ordered, which deals with many detailed issues as to what kind of incentives would be made available and what kinds of residences, in terms of time restrictions, would apply to the units thus made available into some kind of resolution that the city council can consider.

I think in the current climate of Yonkers it is absolutely critical that the city council show itself with regard to the long-term plan where so much implementation responsibility rests with the city, shows itself to be maturely prepared to deal with that.

If not, that has implications for the whole way the ordinance must be structured. If the city council is still resisting passing a resolution in support of the ordinance, how administratively can it be given as we now contemplate all sorts of authority over the dispensation of authority and benefits I think the two are phased as the court suggests and I believe rather than focusing on rearguing what will be in the ordinance, which I think is not productive.

I think we all know what's going to be in the ordinance, at least in pretty specific terms. We should see whether the city council is going to be the body which is going to implement it. It hasn't been able to take any other responsibility in the last three or four years. It may not be able to.

MR. HEFFERNAN: Your Honor, we have not disputed the time it might take to put together a very, very detailed ordinance. What we were disputing this morning was the timing. As far as we knew this was being worked on for the last two months and now we find out today we are still in the process of looking at the city and we have not put the pen to the paper.

We agree with the NAACP. If the city is not going to be able to pass a resolution that indicates it wants to go forward with this thing. I really think we're kind of wasting our time here. I don't know if Mr. Abeles kind of understood your suggestion of putting something down in a few hours.

THE COURT: Let me repeat what it is. I would think Mr. Abeles it's really very much to your interest to have this done, assuming that one really wants to work on something which is going to see the light of day and be constructive and I'm sure that is your wish. I would envision a resolution which would be essentially a cut and paste of the consent decree and the long-term plan, which would be simply the sense of the city counsel.

The sense of the city council is that it will implement the long-term plan by adoption of the specific ordinance which is in preparation. That happens within the next -- the city council acts on that within the next say week or two.

One or two things happen. The city -- in the meantime you and your associates continue work on the preparation of the detailed ordinance. If the Yonkers City Council passes this resolution, it then has a significance in that it will negate the resolution they passed last week and will be a demonstration of their willingness to participate in a responsible way in this implementation. If they don't pass it, then, as Mr. Sussman was suggesting, we'll have to restructure the long-term plan, which very much is a product of a consent decree and an attitude and belief that there would be a good faith working relationship between the court and the parties and the city.

So that at least I'm not saying -- Mr. Newman may have some other views -- I'm not saying what you're proposing should not be done. I'm simply saying while it is being done it's important for everybody early on to have a clearer view of what the attitude of the city is going to be.

MR. SCULNICK: Your Honor, I have to reiterate I think with all due respect this will backfire. I appreciate the court's

desire to have the city council make a tangible demonstration of its willingness to proceed, but without the --my prediction is they are not going to be willing to consider an ordinance that commits them to something that hasn't been prepared yet, that hasn't been drafted.

MR. SUSMAN: It has been.

THE COURT: Mr. Sculnick, I understand your view. I have to tell you this. I have to tell you this, that in the light of the city council's action last week I'm not prepared to go to the end of the summer without some city council action which constitutes a commitment to implementing the housing order. I mean last Tuesday we had the Supreme Court denied certiorari. We had statements by elected officials that this was a new day in Yonkers and then we had the unanimous adoption of a resolution which was nothing short of a flouting of the court.

Now, if we're going to have to proceed independently of the city council, we might as well know that now and we'll proceed in that fashion.

So, the threat -- you don't mean it as a threat -- but the prediction that it will backfire and that the city council will resent it and, therefore, not adopt it, is one which I might have entertained at some earlier stage in these proceedings, but I'm not inclined to entertain now.

MR. NEWMAN: It seems to me that what Mr. Abeles is outlining may not be what we desire at all. I don't think we want to get to the point where an ordinance is drafted that is so specific in its detail and in outlining the incentives that it's tailor made to a specific site or specific opportunities.

The long-term plan as written outlines a whole series of incentives, all of which may be used in whole or in part, only some may be used. The idea is we set up an office of a housing implementation, a developer comes in with a piece of land. We look at the peculiarity of the situation and we tailor a remedy or a series of abatements from the city to make that

work. The city participate in it, the developer does and the office of implementation does.

We are now in a position with the long-term plan written and the incentives spelled out to pass an ordinance which is general and all embracing, large enough to encompass all the incentives the developer may need. It doesn't mean we give a developer everything he may possibly have.

THE COURT: But it doesn't involve the drafting of a new zoning map.

MR. NEWMAN: Certainly not. At this point we're not trying to get the city council to pass on a pig in a poke. We're asking them to pass on something that the city's attorneys have worked on with the plaintiffs' attorneys in producing a long-term plan and a set of incentives. It's not an abstract thing that they are passing and I think that the judge is absolutely correct and the plaintiffs' concern is justified.

We need to see whether the city council is going to move on this and if not we have to go back to your fall back position and that is to use the city land.

THE COURT: Mr. Sculnick, when is the next regularly scheduled city council meeting?

MR. SCULNICK: A week from tonight, your Honor.

THE COURT: What date is that?

MR. SCULNICK: The 28th.

THE COURT: It seems to me that it should be on the agenda then and would you prepare in the appropriate form for the city council a resolution which adopts the provisions of the consent decree and the long-term plan and distribute it to the court and to the parties by next Wednesday -- when is the latest time for it to go on the city council agenda?

MR. SCULNICK: The agenda was put together yesterday, your Honor. For something new to get on the agenda requires unanimous consent.

MR. SUSMAN: That's the day before. Today is only Tuesday.

MR. SCULNICK: The rules committee meeting was yesterday for next Tuesday's meeting.

MR. SCULNICK: Your Honor, the main issue up for consideration on next council agenda is the adoption of the city budget.

THE COURT: I'm aware of the problems associated with that.

MR. SCULNICK: I appreciate that, your Honor.

THE COURT: When is the next meeting thereafter?

MR. SCULNICK: I don't know, your Honor. I'll be glad to check.

THE COURT: And what is required to call a special meeting?

MR. SCULNICK: I believe what's required is the -- I think the city manager can call a special meeting. I think there's some arrangement with the consent of the mayor --

THE COURT: I would think that it would not not in the best interests of the members of the Yonkers City Council to do this at a special meeting and I think it would be in the best interests of the city council of Yonkers to do it at the next meeting. It's one of the reasons why I want a copy of the Yonkers' city charter or whatever it is that deals with these matters.

MR. SUSMAN: Judge, there is one other point that I think should be mentioned on the record. To say the meeting is about the budget is all well and good, of course the major dispute regarding the budget is the provision of in $8 million for the purpose of the sites.

THE COURT: I understand that. You know. I think it should be put on the agenda for the next meeting and I'm just not familiar enough with the rules of the city council to know how that can be done. I'm sure there must be some mechanism, pursuant to which it can be done or some emergency procedure or somehow. I'm sure if there were a will to do it on the part of the city councilmen it could be done. I really hope we're not going to go back to where we were last summer with brinksmanship and freezes and things of that sort.

All right. Mr. Sussman, Mr. Sculnick, will you draft and send to the parties the proposed resolution. I think you understand it does not to have any more detail than is set forth in the consent decree and the long-term plan. It should make clear that it is the subject to further implementation and will you also advise as soon as possible whether it has been placed on the agenda for the next meeting and, if not, when the earliest date is that it can be considered by the city council.

I don't want to get to the point of directing the city council to meet, but I don't have -- I have little doubt that I would have the power to do that. All right.

Mr. Abeles, I hope you realize that the whole purpose of this is not in any way to denegrate what you are doing but to help focus more clearly on what has to be done and who is going to do it.

It was my understanding, and I think Mr. Newman was suggesting this, that in large measure the long-term plan was intended to be self-generating, that is, that the private developers would come forward with proposals.

Now, obviously, in determining which proposals to accept or reject or to have some coordination of that, one has to know the answers to the questions that you are now asking. But this really deals with a different matter and it deals with the matter of whether the city council is going to be the responsible body or some other entity.

MR. ABELES: I appreciate the frustration that is in everyone's voice, although I only had a newspaper familiarity with this problem until the last month or so, I can well appreciate, having been involved in the type of controversy normally on the plaintiff's side, the frustration that everyone feels and especially the court.

I would like to make two observations which may help all the parties in on this phone conversation. First, what I envisioned in our product is not a detailed program or plan site by site but it's a generic ordinance which converts on any and all sites which are appropriate.

THE COURT: Good.

MR. ABELES: Secondly, if I may, by example, give to everyone some sense of the problem that we're dealing with and perhaps that will add to everyone's understanding. There are probably across the Hudson a hundred Mt. Laurel type ordinances which have been adopted since 1984 in compliance with the Supreme Court decision of New Jersey's 1983 decision. A fair review of all those will suggest that perhaps only a quarter or a third are producing results, that a number of these ordinances, especially in the more developed parts of the state, have not seen any public or private efforts come and the effort that we are making, together with Mr. Sculnick and I believe with at least the staff people in Yonkers, is to produce a generic ordinance which will not suffer the same fate.

Because I viewed that as an ordinance which is adopted and does not produce anything and takes us 18 or 24 months to discover that nothing is really happening will be a worse

answer to the problem than an ordinary instance which has a chance of producing what I think the long-term plan states.

My view is it's a general policy and principle and the ordinance which Yonkers is trying to produce, hopefully, with our professional assistance, that is to implement that and the reason again for why this is not a matter of a few hours of adopting an existing ordinance is we do not want to adopt something which is not tailor made to the realities we found in Yonkers and if it's not tailor made to that situation it will leave all of you in a greater sense of frustration in at least a year from now.

As I understand, no one likes to waste one day's worth of time and we want to press everybody to get it done while the iron is hot and not give anyone the sense of the thing has gone away. It has been important for us to try to find out what are the ingredients that you put together that will bring forth the kind of private development efforts.

My view, having been involved as a practitioner and a developer of Mt. Laurel housing, is that the greatest degree of success is when you can get the private sector to use these resources and taking into account the realities that that sector has to deal with is to give everyone concerned, plaintiff and defendant and as well as the court alike, a sense of false hope.

THE COURT: Well, I think that's a helpful statement. I think we want two things, obviously. We want ultimately there to be an ordinance which will work and the second thing we want to make sure the workable ordinance when it is produced will be adopted.

And I'm merely dealing with that second issue now because there just is no reason to suppose that the city council, which unanimously passed the moratorium and all public building in the face of all that had gone on before, would adopt any ordinance if it were in the mood that it appears to have been in on Tuesday. So that this really shouldn't preclude

anything that you are suggesting. It should just give it a greater hope of reality.

MR. ABELES: I understand that the court needs a sense of good faith here.

THE COURT: Yes. The latter is because that's a phrase that has been used quite often in this case.

MR. ABELES: I understand that. I think what Mr. Sculnick's problem -- and Mike you will correct me if I am incorrect here -- is that it's your sense, perhaps, that something generated internally and viewed by the council --

MR. SUSMAN: It's a court order. It's not generated internally. I really think this is being belaboring talking about it being generated internally.

THE COURT: I think it would be helpful to have the draft resolution before everybody -- if we're going to pursue this further. If we were in Albany, one would walk into the legislative drafting office, put down the consent decree and the long-term plan and say put this in the form of a resolution and in two hours the staff would generate it in the form of a resolution. I really do think it's a task of that magnitude for this stage, for this stage.

All right. Let's proceed in that fashion.

Is there anything else?

MR. SUSMAN: Yes, judge. Are you planning to have a meeting with regard to HUD's most recent communication to the court and if so do you have any sense at this time as to when that might be? In terms of the timetable that's being proposed by HUD, I believe it's some six or seven months additional --previously adopted as I under it by the court with a reservation of a right to object.

THE COURT: That would be the timetable unless anyone objected by the 17th and HUD objected.

Mr. Heffernan. I keep talking about that famous Supreme Court case United States against SEC which was tokenly referred to in the solicitor general's office as the United States against the United States. Before such a meeting takes place is there going to be some discourse as between the Department of Justice and HUD?

MR. HEFFERNAN: Your Honor, there has been discourse with regard to schedule. There is now further discourse with regard to HUD's review of the preliminary site report and that discourse is part of the reason for HUD asking for an extension to July 21.

MR. SUSMAN: I am not objecting to the extension to July 1. My objection was the extension to August '89.

MR. NEWMAN: Your Honor, Pete Smith and I will be meeting tomorrow morning to try to prepare an alternate schedule speaking to the issues that had you had raised and we would then distribute it to all parties at the end of the day tomorrow. We're hoping that we can get a schedule, a new schedule, that is closer to the March 1 construction start than we had planned for.

Pete Smith is very concerned about going through a second summer without construction starting and we really would like to see if we can put something together and try it on HUD. If HUD then objects, we should have a meeting and work it out.

THE COURT: The answer to your question, Mr. Sussman, is yes, I'm prepared to have a meeting. I think before I jump in I want to have justice and HUD have an opportunity to see whether they can't within the executive branch or the government resolve some of these matters.

MR. LARIZZA: Your Honor, that letter was shown to the civil rights division before it was sent. There was no objection to the sending of the letter at that time.

I'm not sure that I appreciate -- and I mean no disrespect-- the court attempting to open within the justice department a debate which I believe was settled.

Now, if the other parties have difficulty with the schedule that we proposed and we should propose an alternate schedule, that's fine. I'm certain HUD will consider that.

But in terms of what the appropriate schedule is as far as HUD is concerned, I think it ought to be made clear that I speak for HUD in matters involving the Yonkers case, not Mr. Heffernan.

THE COURT: I understand that. If Mr. Heffernan tells me that the Department of Justice believes that that's an appropriate schedule and is consistent with the needs and pressures, then I will know that that's the position of the department. I thought -- that's why I asked whether there was communication going on --

MR. HEFFERNAN: I saw the schedule before it went out. What I was referring to before what may be a matter of more concern, namely HUD's response to preliminary site reports, I think it might be worthwhile to get that particular response of HUD before. I think it may be in before July 1, before we deal with what the schedule may be.

MR. LARIZZA: Your Honor, I am still concerned about this. When the court seems to be expressing thoughts as to what the the Department of Justice's position is, the letter was signed by me.

I am an employee of the Department of Justice and I represent HUD and as far as I'm concerned there is no doubt that the letter that we submitted containing HUD's schedule is the position of the Department of Justice. I don't think it's

appropriate for the court to decide what our position is by, in effect, taking what should be an intra-agency debate and making it a matter of judicial scrutiny.

THE COURT: No. What I was saying was just the opposite. What I was saying was that I was not going to make it a matter of judicial scrutiny and hold a meeting on it if, in fact, there was -- I think I used the word discourse ongoing between HUD and the department with respect to that.

MR. LARIZZA: It's ongoing with respect to the matter of schedule.

MR. HEFFERNAN: Except, your Honor, there is no discourse ongoing with respect to the schedule that was submitted by HUD last week. There may be a discourse in the future depending on what the results of preliminary site report are. That is something we would have to visit after the time HUD gets that repsonse in. That's why I was suggesting if we were going to visit this, it might be more appropriate after the July 1 date.

THE COURT: I think that's right. Let me extend that date to July 1, which is the date for the HUD response to the sites and we will have a meeting probably during the week of July 11 and at that meeting -- I would like to have a meeting that we previously called a workship meeting, and one of the matters on the table will be that schedule.

I agree, however, that we should know what the situation is with respect to the sites before we spend a lot of time on whether it's March or August. All right.

MR. NEWMAN: Are we planning a meeting for around July 11?

THE COURT: Sometime during that week, depending on whether there's a need or not.

MR. NEWMAN: All right. I will be out of town until the 13th.

THE COURT: All right. We'll do it after the 13th. Will you be back on the 13th?

MR. NEWMAN: Yes. I will be back on the 13th. Let's tentatively say July 13th for a meeting. It may be a late afternoon or early evening meeting.

MR. NEWMAN: Let me ask Mr. LaRizza a question. I hadn't realized he was on the phone. Just to help guide the meeting tomorrow that the housing authority and its consultant and I will be having, I said earlier that Pete Smith was very concerned that we not delay for over a year the possibility of starting construction. Assuming that things go well and agreements can be reached on the matters still in discussion, Pete Smith has expressed a desire to expedite all those functions that he would have to approve on and ask the developers to move quickly as well.

But a good chunk of time is spent in HUD's review. Speaking for HUD now, Mr. LaRizza, do you think HUD might be willing to be a little flexible to help expedite matters? You know the sensitivity of the situation in Yonkers. This is not a normal public housing project by any means.

MR. LARIZZA: First of all, the main difference between the schedule that we proposed and the schedule that the OHA proposed has to do with the time it has taken following the selection of the winning developer. Up until that --

THE COURT: Excuse me. I've got to go off the line. I'm going to hang up now and why don't the other parties continue talking, but I'm going to end, unless there's anything further that is needed of me, I'm going to hang up and end the record in this case.

Thank you.

Yonkers City Council Agenda Item No. 14A, Dated June 28, 1988

AGENDA

CITY COUNCIL OF THE CITY OF YONKERS
STATED MEETING
TUESDAY - JUNE 28, 1988

RESOLUTION

BY OPERATION OF LAW PURSUANT TO RULE IV 4 (B) OF THE CITY COUNCIL RULES:

No. 14A

WHEREAS, on June 13, 1988, the United States District Court for the Southern District entered the Long Term Plan in *United States of America v. Yonkers Board of Education, et al.*, which requires the City of Yonkers to enact certain legislation with respect to the long term housing plan (the "Long Term Plan") required by Section VI of the Housing remedy order of May 28, 1986, and Section 17 of the First Remedial Consent Decree in Equity (the "Consent Decree"), and

WHEREAS, the Long Term Plan and the Consent Decree both envision the preparation of legislation amending the Yonkers Zoning Ordinance as well as other legislation putting into effect the provisions of the aforementioned orders of the Court, and

WHEREAS, the federal district court has requested that the City Council adopt a resolution indicating its commitment to the implementation of the provisions of the aforementioned orders pending the preparation and adoption of the legislation required by these orders.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The City Council hereby declares its commitment to the implementation of Section 17 of the Consent Decree and the Long Term Plan Order through the preparation and adoption of the necessary implementing legislation, and be it further resolved that,

2. The City Council directs the City Manager to take all necessary and appropriate actions through the efforts of the City's legal and planning advisors to draft the necessary legislation in accordance wilth the provisions of aforementioned orders, and be it further resolved that,

3. The City Council agrees to consider the adoption of the legislation so drafted at its next regularly-scheduled meeting followng the preparation of the necessary implementing legislation.

DEFEATED BY A VOTE OF 5 to 1, Mayor Wasicsko voting AYE AND Councilmember Oxman abstained.

This is to certify that the
foregoing is a true and correct
copy of the record on file with
the City Clerk, City of Yonkers,
N.Y.

/s/ Aloysius Moczydlowski
CITY CLERK
Yonkers, New York

Order (Sand, J., June 29, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

80 CIV 6761 (LBS)

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH - NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

CITY OF YONKERS and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third-Party Plaintiffs,

against

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third-Party Defendants.

ORDER

SAND, J.

WHEREAS, the City Council of Yonkers, on June 28, 1988, defeated a proposed resolution to declare its commitment to implementation of this Court's prior housing remedy orders, including the Long Term Plan, it is hereby

ORDERED, that the Department of Justice and the NAACP submit by July 5th a proposed order requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines. Oral argument with respect to such proposed Order will be held on July 12, 1988, at 10:00 A.M.

SO ORDERED.

Dated: New York, New York
June 29, 1988

/s/ Leonard B. Sand
LEONARD B. SAND
U.S.D.J.

Memorandum of Law of City of Yonkers in Opposition to Proposed Order, Dated July 11, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Plaintiff-Intervenors,

80 CIV. 6761 (LBS)

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

CITY OF YONKERS MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' PROPOSED ORDER

Following the defeat by the City Council of Yonkers on June 28, 1988, of a proposed resolution put on the agenda at the direction of this Court to declare the City's commitment to the implementation of the long term plan, this Court entered an

Order, dated June 29, 1988, requesting that the Department of Justice and the NAACP submit by July 5 a proposed Order "requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankruptin ; fines."

On July 5, 1988, the United States and the NAACP submitted a joint motion requesting entry of a proposed Order which set forth four specific actions to be taken by the City:

(1) The adoption, by July 19, 1988, of the necessary zoning legislation to implement {17 of the First Remedial Consent Decree and Equity and the Long Term Plan Order;

(2) The withdrawal by July 19, 1988, of a resolution, passed June 28, 1988, which purported to terminate the City's condemnation proceedings with regard to the St. Joseph's Seminary site;

(3) The publication, by July 26, 1988, of advertisements regarding the implementation of the long term plan and the solicitation of proposals consistent therewith; and

(4) The submission, by July 20, 1988, of a fully qualified candidate to serve as Director of the Office of Implementation.

The proposed Order goes on to give notice to each member of the Yonkers City Council and each appointed administrative official responsible in any way for the implementation of the provisions of the Order that failure to abide by the terms of the Order may constitute contempt of court, punishable by fines against the City or sanctions against willfully contumacious individuals.

ARGUMENT

The Court Should Avoid Entering an Order Directing the City Council to Adopt Legislation

Plaintiff's proposed Order, if adopted, would direct the City Council to approve two specific legislative measures: the necessary zoning ordinance and legislation required to implement the long term plan, and the withdrawal of Resolution 125-1988.*

The City urges the District Court to avoid a situation where it is in the position of ordering the City Council to adopt specific legislation. With respect to the zoning ordinance and other necessary legislation required to implement the long term plan, no purpose can be served, at this point, by ordering the City Council to adopt the zoning legislation now being drafted. Instead, the Court should enter an Order adopting the necessary changes or additions to the Yonkers zoning ordinance necessary to implement the Long Term Plan Order. *See United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987).

This is not a situation where the normal considerations of comity require this Court to give the City an additional opportunity to adopt the specific legislation necessary to implement the Long Term Plan Order. The Long Term Plan Order was entered by this Court, over the City's objection, and now the City has indicated by the defeat of the Resolution proposed by the Court that it will not voluntarily adopt the legislation contemplated by that Order. Under those circumstances, there is no fruitful purpose to be served by directing the City to approve the legislation, under threat of

---

* The proposed Order refers to it as Resolution 19, which was the designation assigned to the it on the agenda. Having been adopted, it was assigned No. 125-1988.

contempt. All that is furthered is confrontation, and the painful possibility of contempt and bankrupting fines.

Similarly, with respect to Resolution No. 125, no helpful purpose can be served by directing the City Council to withdraw it. The City Manager, Corporation Counsel, and outside counsel to the City of Yonkers have all indicated that they will take no action in furtherance of the Resolution. The Resolution, for all intents and purposes, has no force and effect. If this Court concludes that the Resolution is inconsistent with prior Orders of the Court and obligations imposed upon the City, then the Court should declare the Resolution null and void. Upon doing so, there is no need for the Council to withdraw it.

Director of the Office of Implementation

The City has no objection to paragraph 4 of the proposed Order requiring the City to propose to the Court and to the parties a fully qualified candidate to serve as the Director of the Office of Implementation. Pursuant to an advertisement run on June 26, 1988 in the *New York Times* Business Section, the City has received 28 resumes, and the City Manager has forwarded the top six candidates' resumes to the OHA for review. Interviews are scheduled to begin by the end of this week. Some modification to the July 20th deadline may be necessary depending on the progress of the interviewing.

The City suggests, however, that the substantive actions required under paragraph 3 of the proposed Order should be carried out by the Director of the Office of Implementation, and the City therefore suggests that the timing of paragraph 3 be amended so as to permit the newly appointed Director to oversee the placement of advertisements and the necessary communications with developers seeking information concerning the long term plan. The City therefore requests that the Order be revised so that the dissemination of information regarding the long term plan be scheduled for a reasonable period, such as three weeks, following the appointment of the Director of the Office of Implementation.

CONCLUSION

For the reasons set forth herein, the City respectfully requests that the proposed Order submitted by the plaintiffs not be entered, and that instead, the Court take actions consistent with the recommendations set forth in this Memorandum.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & DAY

BY:_____
Michael W. Sculnick

Attorneys for Defendant
City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1891

Dated: New York, New York
July 11, 1988

Minutes of District Court Proceedings (Sand, J., July 12, 1988)

United States of America,

v. 80 Civ. 6761 (LBS)

Yonkers Branch-National
Association for the Advancement
of Colored People, et al.

July 12, 1988

10:30 a.m.

(In open court)

THE COURT: Good morning. To begin on a positive note, I would like to read into the record a letter received by the court from Mr. Dudley, dated June 29.

"Dear Judge Sand:

"On behalf of Dr. Batista and the Board of Education I want to express to the court our appreciation for the characteristically effective efforts of Dr. Pastore in helping to resolve the recent budget dispute between the board and the city.

"His intervention was instrumental in making possible a solution that was mutually acceptable and I know that I express Mr. Sculnick's sentiments as well.

"Some with inconveniently long memories may recall that at the time of the school remedy hearings it was the school district, through its intrepid counsel, who objected to the appointment of a monitor as unnecessary, wasteful and intrusive, et cetera.

"The next time around I may want to rethink that position.

"Very truly yours,

"John H. Dudley, Jr."

A very gracious letter and I am sure much appreciated.

This court yesterday received a memorandum of law from the City of Yonkers which we deemed to be of sufficient importance so that we will mark it as Court Exhibit A of today's date so that it will become part of the record.

(Court Exhibit A marked)

THE COURT: It represents the court believes a significant statement by the City of Yonkers. The memorandum is in response to the joint application by the Department of Justice and the NAACP for an order directing the city council to take certain actions by certain specific dates.

The memorandum reads in pertinent part, page 3:

"The city urges the district court to avoid a situation where it is in the position of ordering the city council to adopt specific legislation with respect to the zoning ordinance and other necessary legislation required to implement the long-term plan. No purpose can be served at this point by ordering the city council to adopt the zoning legislation now being drafted.

"Instead the court should enter an order adopting the necessary changes or additions to the Yonkers zoning ordinance necessary to implement the long-term plan order.

"See United States v. Yonkers Board of Education, 837 Fed 2d, 1181, 1237, Second Circuit 1987."

Exterpolating now. It is a reference by the City of Yonkers, an invocation by the City of Yonkers of that portion of the decision of the Court of Appeals which affirmed the

court's order directing that certain actions be deemed taken in the absence of action by the City Council.

Returning, then, to the city's memorandum:

"This is not a situation where the normal considerations of comity require this court to give the city an additional opportunity to adopt the specific legislation necessary to implement the long-term plan. The long-term plan order was entered by this court over the city's objection and now the city has indicated by the defeat of the resolution proposed by the court that it will not voluntarily adopt the legislation contemplated by that order.

"Under those circumstances there is no fruitful purpose to be served by directing the city to approve the legislation under threat of contempt. All that is furthered is confrontation and the painful possibility of contempt and bankrupting fines.

" Similarly, with respect to Resolution No. 125, no helpful purpose can be served by directing the city council to withdraw it. The City Manager, Corporation Counsel and outside counsel to the City of Yonkers have all indicated that they will take no action in furtherance of the resolution. The resolution for all intents and purposes has no force and effect.

"If this court concludes that the resolution is inconsistent with prior orders of the court and the obligations imposed upon the city, then the court should declare the resolution null and void. Upon doing so there is no need for the council to withdraw."

Now, that memorandum received yesterday, plus a provision suggested in the order submitted on behalf of the Department of Justice and the NAACP, suggests that maybe a way of proceeding exists which will be more constructive, less confrontational than the present situation.

My reference to the proposed order is to the last paragraph which talks of the court taking other actions as necessary,

including the possibility of relieving the City of Yonkers and/or the city council of functions previously reserved to it by the terms of the long-term remedy order and the consent decree of January 28, 1988 and creating and requiring the city to fund entities accountable to the court and with the power and authority to implement the outstanding housing remedies.

I am of the opinion, reinforced by the city's memorandum, that perhaps that time has come and that the court and the parties and the city council should realistically confront the situation which now obtains, a situation in which the city council adopts resolutions which are recognized as being indefensible.

I would suggest --

Let me make one preliminary comment. The suggestion by the city that rather than directing the city council to do things, the court act has two problems.

The first problem is that this court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or power but rather a concept of what the proper role of a federal court is in a circumstance such as this.

Second, the suggestion by the city that the matter be dealt with by court action rather than by city council action is a useful and productive procedure provided that there is no necessity at any stage to return to the city council.

Obviously, if the city council were to say, well, Judge Sand, those are your orders, you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built.

With that by way of background, I would invite the consideration and comments of the parties to the following:

That there be created by an order of this court an entity, the Yonkers Affordable Housing Commission, to be comprised of the following persons:

The city manager of Yonkers or his designee, the head of the Yonkers municipal housing authority or his designee, a representative of the United States Department of Justice, a representative of the NAACP, the fifth member to be the executive director of the office of Fair Housing Implementation who shall serve as chairman of the commission and who shall have a vote only in the event of a deadlock among the other members of the commission, that is, will have only a tie breaking vote.

In the event that any commission action shall be predicated on the casting by the executive director of a tie breaking vote, any member of the commission may appeal the matter to the court for its determination.

Any vacancies in the membership of the commission shall promptly be filled by the nominating party, if such vacancy shall exist for more than 20 days, by the court.

Any and all funds necessary for the operation of the commission shall be provided by the City of Yonkers from its general treasury.

All of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan shall vest in the Yonkers Affordable Housing Commission including, but not limited to, adoption of zoning variances, density bonuses and any other actions necessary or appropriate to facilitate construction of said housing.

In a manner consistent with said remedy orders to the maximum extent possible deference shall be given to the existing enactments of the city council and such views as it may from time to time see fit to communicate to the Yonkers

Affordable Housing Commission but such enactments or expressions of views shall not be binding on the commission.

The city council may at any time petition the court to rescind this order vesting authority in the Yonkers Affordable Housing Commission and to abolish that commission upon a showing of the city council's willingness and ability to function in a good faith, responsible fashion in implementation of the housing remedy orders of this court.

Were such an order promulgated there would also be adopted the affordable housing ordinance of the City of Yonkers generally along the lines of the draft submitted by the Abeles firm which draft tracks the long-term plan except that where reference is made to action by the City of Yonkers or any of its agencies, such as the Yonkers Planning Commission, there would be substituted the Yonkers Affordable Housing Commission.

Subject to such modification of dates as may be appropriate, the other provisions in the proposed order of the Department of Justice and the NAACP with respect to appointment of a director of the office of implementation, dissemination of information and so on would also be adopted.

If there are any questions, I will attempt to answer them. If the parties are prepared to comment on the court's suggestion now, I would hear them. If they wish to adjourn until tomorrow to give the matter further thought or consultation, I would entertain that as well.

Does anybody have any questions or wish to make any comment?

MR. SUSSMAN: Your Honor, I know some of the clients are here, Mr. Wallace, the head of the NAACP. Is it possible to have a ten minute adjournment?

THE COURT: Yes. I should also note the presence of the corporation counsel, the mayor and the city manager and, yes,

and it need not be ten minutes. Why don't you simply advise me when it is that you wish to reassemble.

(Recess)

(In open court)

THE COURT: Well, someone. (Pause) It is a rare moment. Mr. Sculnick.

MR. SCULNICK: Obviously, I am anxious to hear the views of the other parties as well, but quite simply the city would like to bring it back to the council to give it some consideration. Your Honor has obviously given it a great deal of thought and it deserves commensurate thought by the city council.

It does come as something of a surprise because I think it goes a bit further than the point we were trying to make in our memorandum, but I understand your position. The MHA is unsure of its role. Its role has traditionally been related to public housing and this puts it into the long-term plan. These are issues we would like to give some consideration to.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Your Honor, I have not been able to reach the ultimate departmentmental official that would have to make a final decision but I do have a few comments.

Your Honor, our reaction would be negative to the proposal of the court. Our reason for submitting a proposed order as we did was very simple.

One of the things that we all learn as we grow up, your Honor, is from a very early age there has to be respect for the law and in this case quite plain and simply the City of Yonkers has shown a total disrespect for the law.

While this court was affirmed by the Second Circuit in a law on June 13 the Supreme Court decided not to disturb: When two years passed, the housing remedy order; where six months passed, the consent decree. Nothing has been done in this case and past the submission of the city, the brief you were handed this morning clearly indicates the city council of Yonkers simply does not want to take any responsibility for carrying out the law.

They want to flout the court's orders. They want to make all kinds of statements in the press and everywhere else about your Honor, about the orders, about what they are not going to do and they want once again to be let out from under having to do anything so they don't have to explain to their citizens why they are doing something or not doing something.

I would read, your Honor, from a New York Times article that I just was handed this morning from Sunday, July 10, and in talking about the proposed order of the United States and the hearing today, the article reads as follows:

Councilman Nicholas V. Longo, the Republican minority leader and one of those who voted for condemnation of the church property, said: I don't think the votes are there for the council to reverse itself. He anticipated a contempt hearing before the judge.

Asked if he was prepared for that and the possible consequences, Mr. Longo said that "At that point we'll be able to assess the wisdom and veracity of Mr. Spillone who says the judge will never do anything."

Your Honor, we believe the court has to do something here. We believe the court has to send a message to the city that it cannot continue to flout the court's orders and then have the court let it off the hook by doing something else.

We think and the reason we proposed the order as we did, your Honor, is we believe the city must take responsibility for its actions. It has to implement the long-term plan. It has to

appoint a housing director. It has to do it within the timetable that we set forth and, if it doesn't, the United States is fully prepared to move forward with contempt.

Thank you.

THE COURT: Mr. Sussman.

MR. SUSSMAN: I can't speak except if I am standing at a podium, so I am moving over here.

I disagree strongly with the comments of the United States, Judge, and I also don't think that this matter should be remanded to the city council of the City of Yonkers for any decision on its part.

I don't think this is a matter that should be determined by consent of the city council. I think they long since altered that. The court should enter the order provided by the court on its own motion and in light of comments by all parties should enter this order.

I don't see the City of Yonkers coming back to the court as it has done so many times before with some alternative or some other impact. I think we are beyond that.

Let me make a few comments directly on what the United States has said and some of the specifics your Honor laid out. The fact of the matter is that the order which was prepared jointly by the United States and NAACP has essentially a sequence of events in it as I am sure the court is aware.

The sequence of events are, first, fines, then potential jail time, then and upon a finding of contempt with reference to failure to abide by orders after those two fairly strong measures, then we would according to the sequence of that order go forward with the creation of a new entity which would be funded by the City of Yonkers to carry out tasks that Yonkers still had not carried out. That is the sequence.

Frankly, that sequencing in my opinion is unnecessary. I think what the court has suggested this morning speaks to the non necessity of the sequencing. It seems to me it is clear that the only issue now before the court really, as you put it yourself, is whether there should be fines and contempt because the City of Yonkers through its counsel has refused to act and thumbed their nose at the court through the public statements, resolutions and non-compliance or whether that step essentially should be itself circumvented or ignored.

In other words, no fines, no jail and simply the most drastic action taken, which would be the stripping of the City of Yonkers' governmental officials directly of their responsibilities. That is the third event in the order. It would be the first event in the court's directive.

In my opinion is a fully justified event. I don't think we have to go through and to my mind there is really the charade of the city council not taking actions they have been ordered to take as they already said they would not take and then being fined which, as everyone knows, would redound substantially to the detriment of the minority community in Yonkers. There is no doubt about that.

There is really nothing that the court has indicated it would do about that. The court has always taken the position that the internal budgetary affairs of Yonkers are apart from this case. The court has been consistent with it and, therefore, what we are left with is Yonkers perhaps paying miiiions of dollars in fines, budget cuts that affect deleteriously our side of the community much more without any real recourse.

Then we get jails and the jailing of people which certainly can be justified, as would the fines be, I am not saying they wouldn't be justified. The question is to what effect.

I said a year or two ago about the subject, and I really believe the same is still true, that what we have is the creation of martyrdom. We assure their political success so they would

succeed themselves and I don't really see a great purpose to be served by that.

I think the message that has to be sent and I think it is consonant with what the government has said, Mr. Heffernan, that you have not obeyed the law. You told us you are not going to obey the law. Your chance is up. Goodbye.

Now, I think the problem with the court's proposal is in a way it is not strong enough on that point. Let me make a few comments about that. I don't think any order now should say that this five member body should pay deference to existing enactments of the city council and then have language that such enactments would not be binding. I don't think there is any place for that. We know what those are.

THE COURT: That was a reference to existing zoning, existing --

Obviously, when you consider any housing or any development, you look at what is in place. I certainly did not mean to include the last two resolutions of the city council with respect to the court's view as to whether they are null and void, I thought I had already made clear that I not only regard them as being null and void but the very adoption of them being contempt of court.

MR. SUSSMAN: I guess the point is that perhaps we should have a more specific order which directs this group to the existing and as changed zoning ordinance of the City of Yonkers, building codes, whatever else needs to be referred to, but it should be made clear in this order, I think language should be included, that if the city council of Yonkers is specifically on notice that should it take actions and pass resolutions intended to impede the work of this commission, the court would view that as contemptious. I think that needs to be here.

Sure, their input on matters of substance where those inputs are made in good faith, fine. I don't have a problem

with inviting that. I do have a problem with the suggestion that other than long-standing zoning ordinances, as they are amended by the long-term order legislation, that other than that, any deference should be paid whatsoever. I think the contrary and we also have conferred with Mr. Wallace.

We also have a few other concerns I would like to put before the court. First of all, the NAACP would like to be represented on the group and I believe that at present the NAACP would be a proper and appropriate designee rather than "counsel", meaning myself.

At the same time we would like for any order to permit at meetings counsel to be present for the reason that given the long-standing involvement I have had in this case and the nature of the organization, obviously changing presidencies and different technical issues which any president may learn about but in the transitional period, we would like that to be explicit so there would be no dispute.

I understand we would have one vote cast by the president, but we would like to have counsel's presence permitted at the meetings.

We also feel that the city should be on clear notice that if it has two designees out of five, which is what effectively is being done, excluding the executive director of the Fair Housing Office, that those designees are to act here in furtherance of the orders.

I don't want to create a situation quite honestly where everybody is two-two and we go to the executive director and we are appealing everything to the court. It would extend the stalemate and would only lead to tremendous delays.

If the city is going to be able to participate with two votes essentially, and I respect the independence of the MHA and the possibility of political leverage, we can't have people there doing the bidding of the city council which led to this in the

beginning. It is institutionalizing the deadline and that leads to the court having to play a greater role rather than a lesser role.

We will be here having a review on every vote. I think we have to set this up with the cognizance that if there is to going to be representation of the city, those representatives have to act in furtherance and be able to defend what they do, as we do, in furtherance of the objectives.

Now, let me just make a couple of other comments and I don't know if we will discuss this in any further detail. I am not satisfied with the legislation prepared but it does, as your Honor says, track rather respectfully the decree. It seems to omit things that such legislation should really deal with or purport to deal with. Let me just mention a few of those things and make a proposal which I have discussed with other counsel on this.

Just let me mention three problems that we see or I see at least in the legislation. First of all, the legislation provides that the planning board, your Honor has now said your order is going to be signed, the proposed order would make this new group, the Affordable Housing Commission, that group would have decisional responsibilities.

Clearly under state law there would be appeals both by property owners who don't like what is being dispensed to them and by potentially neighborhood groups or neighboring property owners who believe that whatever is being done trespasses some right of theirs. I think the legislation is going to have to deal with that question.

I don't think it can be silent on that or we will have a repeat of what we have had with the seminary and the racetrack. I think we either have a process that is called for in the legislation by which anyone who has such complaints have to provide written notice and there is an appeal process administratively and recourse to the courts.

I believe the recourse should be to this court because I believe if we don't do that we have the prospect of substantial delay, nonimplementation, et cetera. I respectfully argue that this court might want to appoint a magistrate to handle many of those details because this judge I know has 400 odd cases and every appeal can't really be handled here.

THE COURT: The reason behind having the chairman exercise only the tie breaking vote but to vote before the matter came to the court was a hope that that would minimize the occasions on which there would be recourse to the court and that any matter that did come to the court would come to the court to review a determination that had already been made.

Obviously, when you create any body, its effectiveness is largely a function of the caliber and integrity of the persons who occupy that body. The thinking was to have -- with respect to the two representatives of the city -- to have persons who were in fact representative of the city but who did not hold elective office.

I am aware of the fact that individuals may change and one cannot assume the continuity of the present encumbents, but I don't know of any language that can be put into a decree which is anything other than precatory which says that persons are to act responsibly --

MR. SUSSMAN: I agree.

THE COURT: -- and in good faith.

MR. SUSSMAN: It might be described as precatory, but I do think that the notion is that this body is being created to carry out orders rather than carry on debates has as to whether orders ought to be carried out is an important conception.

With respect to the means, there may be disputes in given cases but that presupposes a general agreement as to objectives which the members of the group in my judgment have to share. I think the order has to be premised on the fact that we share

them. Not we are just adjourning all our disputes about whether anything is going to be done at this meeting.

Frankly, we will just really be wasting our time and effort and motion. It will have a polarizing rather than a curative effect. I think that is really a difficult decision the court has to make.

For the NAACP, we are prepared to sit in a room with the government, with the executive director and with the city manager, with Mr. Smith and deliberate on a case by case basis which is, of course, the nature of the deliberations this body would engage in with the understanding that those in the room are implementing an order and not that we are debating whether the order should have been entered.

THE COURT: Let me also - just sharing thoughts with you. Ideally the chairman would be the key figure here and the body would be -- once the chairman had earned the respect of the commission, would function in the nature of -- the relationship would be analogous to a chief executive officer and a board of directors. That would be the ideal.

MR. SUSSMAN: You are referencing the sense of deference which is accorded generally to the operating procedures that are undertaken by that chief executive with review in policy matters by the board.

THE COURT: Yes.

MR. SUSSMAN: Let me make a couple of other comments. While I agree entirely that the planning board, and I believe it is the planning board, should not have the functions at this point in time, rather they should be superseded by this body in terms of decisional functions.

It is also true there has to be a provision allowing the executive director to make use of the staff to the extent necessary in effecting the analyses that must predicate his recommendations. Again I don't think that should just left be

up to -- that is an expectation -- I think that should be in any order that the city is directed to provide that support staff as needed to do the analyses and again I think what we are really doing here is bifurcating between the political wing of the city and the administrative wing. I think that is really what is being attempted.

THE COURT: You see, as so often happens in our society, the problems end up on the desk of a federal judge. There are other approaches that the city council might have taken to deal with the problems it confronts, but it has not done so. It has come forward with no affirmative suggestion other than that the court do it.

I don't want to get into a debate with any individual city councilman, but I do think it's appropriate that I repeat something which I think I have said on more than one occasion in the eight years of this case.

The problem before this court is not whether it has power to effect its remedies. It has vast powers. Bankrupting Yonkers is simply one of them.

I have from time to time as a mental exercise drawn up a list of the possible sanctions that could be invoked. Incarcerating representatives of Yonkers is simply one of them.

One could draw up a list of all the discretionary benefits which the City of Yonkers receives and go down them item by item and raise the question whether it is appropriate that a community which has chosen to be the national symbol of defiance to federal civil rights orders is an appropriate community to be the recipient of such discretionary funds. I could go on and on.

The suggestion of the commission, and it is only a suggestion, is not viewed by this court as a retreat from the exercise of power. It is simply an alternative means of accomplishing what is the prime objective. The prime objective

is not a civics lecture. I have given too many of those. The objective is to get some housing built.

MR. SUSSMAN: Just two other points. I frankly think that is a principal issue and it may in fact, juding from the government's remarks, be a slight difference in emphasis between the NAACP, for instance, and the government.

I think as well that overwhelmingly the critical need is implementation. The City of Yonkers actions to me are relevant mostly because they have impeded implementation.

THE COURT: They have abdicated, but the recognition is that they have abdicated, whether from choice, voluntarily or by virtue of circumstances, there is an abdication of that role and there is a vacuum and we have to deal with that.

MR. SUSSMAN: If you perceive the vacuum needed to be filled as the priority as I do and perhaps as the court does or whether you see the key issue as has been very well stated as a community's refusal to follow federal court orders and the issue being compelling them to follow court orders, I think that is a very critical question, but given the amount of time that we have spent, to spend more time in a sense playing out whether we can force them to comply and at what cost, that is, fines, jail, the like, in a sense as opposed to getting the structure in place or playing that out before we get a structure in place doesn't seem to me at this point justified. I think that is an issue.

THE COURT: The other way in which the matter may be dealt and there are some decisions I think that can be made fairly promptly and some may require some further thinking is to treat the matter generally as it is treated in the proposed order. That is, the creation of the entity being one of several steps that are to be taken.

What I think might be the most appropriate way to leave things is to set a schedule for various things that are to happen and for the filing of further comments.

Let me also raise in connection with the commission concept a problem which I perceive but frankly do not know the definitive answer to and that is the relationship between the commission, the finances of Yonkers and the Emergency Financial Control Board.

For example, one of the functions of the commission would be to deal with applications for tax abatement. How that gets structured in in terms of the overall financing of Yonkers and its obligations vis-a-vis the Emergency Financial Control Board, if it has any, which relate to finances are matters which I think should be thought of by the parties.

It seems to me the first and immediate matter to be dealt with is the appointment of the director of a Fair Housing Office. There would be such a person, whether he will occupy the role limited to that envisioned in the long-term plan or the greater role envisioned in the court's suggested commission probably does not significantly alter the background qualifications one should be looking for for a person to occupy that role.

Now, I have received a list of candidates.

I am talking about the Office of Implementation and not the Fair Housing Office. I get bogged down in the titles.

Has everybody been furnished a copy of the resumes?

MR. HEFFERNAN: Are you talking about Oscar Newman

THE COURT: I have a letter from Oscar Newman dated June 30 with the resume of a few candidates which says " it is the intent of the city manager and myself to interview shortly after I return from vacation." I think he is back today.

MR. HEFFERNAN: Your Honor, if I may ask a question. In the city's brief we got this morning it said the city received

28 resumes and the city manager has forwarded the top six candidates for review.

If I could ask Michael Sculnick whether those are the same people as the judge is talking about or whether we are talking about different people?

MR. SCULNICK: I think those are additional people.

MR. HEFFERNAN: That will be 11 or 12 now?

MR. SCULNICK: 12.

THE COURT: I would like to set the earliest possible date for the court to interview the leading candidates. Could that possibly be this week? Could we do that Thursday?

MR. SUSSMAN: Sure.

THE COURT: Thursday morning --

MR. HEFFERMAN: Your Honor, again, there is a meeting scheduled, which has some importantance, on Thursday morning at 10:30.

THE COURT: All right.

MR. SCULNICK: Your Honor, I think it would be impractical for the court to be interviewing them by Thursday because neither the city manager or the outside housing authority has interviewed anybody. I think there should be that screening process and perhaps by early or middle of the next week, but I don't think anybody could come forward to the court this week.

THE COURT: Let me have, then, by Tuesday of next week the resumes of the leading candidates and, if possible, if there is a consensus candidate, that would be very nice. If not, then I will interview the two or three leading candidates. I will

set the date for that interview after I have received the recommendations next Tuesday.

With respect to the proposed ordinance, whether it is adopted by the city council as directed by the court, adopted by the court or adopted as the first act of the Yonkers Affordable Housing Commission, really affects some of the provisions but does not affect many others.

MR. SUSSMAN: On that matter we had ourselves -- since we just got this -- I think counsel have agreed that next Monday we are going to meet with Abeles and Schwartz and try to get together some additions.

THE COURT: Fine. Then you are going to meet on Monday.

MR. SUSSMAN: I think by the end of that week we were proposing to have it finished and have it in final form essentially, which would be the 22nd.

THE COURT: All right. Then with respect to the concept of a commission -- first of all, let me say that some of the points that you have made as to the language of the commission and so on I think are, Mr. Sussman, well taken and I certainly have not purported to do anything but broadly outline how such a commission should be constituted.

With respect to the matter raised with respect to whether Mr. Smith as the head of the MHA should be a member of that commission or someone else, I was really, apart from my personal admiration of Mr. Smith, I was looking for somebody knowledgeable in housing in the City of Yonkers and not an elected officer.

MR. SUSSMAN: Can we have ten days to make comments on that, perhaps?

THE COURT: Yes. Understand I am not wedded to it. I think that it might be useful here. It might be useful in

alleviating this repeated crisis and confrontation in Yonkers which certainly must be harmful to a community which is seeking to attract industry and achieve other improvements in its circumstances.

You asked for ten days for comments. What I have been trying to do is not to hold everything in abeyance. You had suggested for example, in the order that by July 26 there be a dissemination of matters. Obviously that timetable will have to be altered.

Ten days will take us to the 23rd of August. I am wondering whether we should schedule another meeting now -

MR. SUSSMAN: The 22nd of July. You said August.

THE COURT: The 22nd of July. Should we schedule another session on July 26? That is a Tuesday. July 26 at 10 a.m.

Is there anything other than the matters we have specifically indicated that should be going forward between now and then?

MR. SUSSMAN: Judge, there is one other matter that is of concern. I don't know if there is any record of it yet. I believe this court provided direction regarding the seminary site and the raceway site and I think that we need to know what is happening with those sites at this time.

THE COURT: What is happening physically, legally?

MR. SUSSMAN: Legally. The matter was remanded.

THE COURT: Mr. Sculnick, can you enlighten us as to what the status is in the state court?

MR. SCULNICK: It is my understanding that the proposed orders and briefs are fully submitted and the state court has not sought any further argument or input from any party so it is submitted to the state court judge.

THE COURT: Oral argument is scheduled for next week in the appeal from my orders?

MR. SCULNICK: Yes.

THE COURT: And there is one other matter pending on appeal with respect to the schools?

MR. SCULNICK: That is a pending decision, yes.

THE COURT: All right, then. Let's review it.

By Tuesday of next week --

MR. LaRIZZA: Could I ask a question before you do? Would the Affordable Housing Commission have any responsibility at all with respect to the 200 public housing units or is it limited --would its responsibilities be limited only to the affordable housing, trust funds housing?

I ask the question, your Honor, because I believe when you described the basis for the commission you mentioned that it was to implement housing and my recollection is that the remedy order includes the 200 units.

THE COURT: If all of the orders of this court now in effect were to go forward, it would seem to me that this commission would have little or no operative responsibilities with respect to the 200 units except, of course, as the long-term plan itself indicates one of the considerations in terms of sites for affordable housing and so on would be the sites for the 200 units.

If for any reason there should be a need to revise any of the existing orders, then one might then revisit that question. I think that is as specific as I can be.

MR. LaRIZZA: Thank you, your Honor.

THE COURT: Let's review again what is to occur.

By Tuesday of next week I am to be furnished with the resumes of the leading candidates for the director of the Office of Fair Housing Implementation, executive director.

I understand that the parties are meeting next Monday with Abeles and Schwartz to consider the proposed affordable housing ordinance.

That by July 22 I am to have received comments from all of the parties with respect to the ordinance and with respect to the proposed commission. With respect to the commission proposal, I would like to see a draft of an order appointing such a commission dealing with some of the issues which have been raised. I would ask that such an order be prepared even if there is no strong sentiment in favor of such a commission.

MR. DUDLEY: Your Honor, which date are the comments due by?

THE COURT: The 22nd.

We will meet again on July 26 at 10 a.m. If any emergency matter or other circumstance arises so that it would be appropriate for us to meet at an earlier date, we can arrange to do that. This is a matter of utmost urgency and the court will make itself available.

Is there anything else?

All right. Then, we are adjourned until July 26 at 10 a.m.

(Adjourned to July 26, 1989 at 10 o'clock a.m.)

Comments of the City of Yonkers on Proposed Yonkers Affordable Housing Commission, Dated July 25, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff,
80 CIV. 6761 (LBS)

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

CITY OF YONKERS COMMENTS WITH REGARD TO THE PROPOSED YONKERS AFFORDABLE COMMISSION

At a July 12, 1988 hearing, the Court invited the comments of all parties to a suggestion made by the Court that there be created an entity entitled The Yonkers Affordable Housing Commission ("Commission"). The Commission, which would have four voting members (comprised equally of Plaintiff and Defendant representatives) and a tie-breaking chairman (the Executive Director of the Office of Implementation), would be vested with all governmental functions currently held by the City Council as they relate to the housing envisioned by the Housing Remedy Order, Consent Decree and Long Term Plan, including but not limited to, granting tax abatements, adopting zoning variances and density bonuses, and taking other actions necessary or appropriate to facilitate construction of housing under those decrees. (Tr. of hearing July 12, 1988, at p. 7).

After giving the Court's suggestion due consideration, the City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect, divest the Council of specific state law powers, including core legislative as well as executive functions. Specifically, the City Council now has powers under state law to grant tax abatements, in accordance with statutory requirements, and also has authority under state law to adopt zoning ordinances, grant zone changes, and review requests for variances and special exception uses under explicit statutory criteria. The loss of those specifically granted powers must be viewed with great caution and concern from the perspective of a City Council which is popularly elected. As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

Our review of the caselaw indicates that whereas there is a precedent for assuming certain administrative functions in prison or school board cases,[1] we know of no case in which, as a remedy for findings of violations of the Fourteenth Amendment, a federal court has actually supplanted the legislative functions of a local municipality. In those cases where the Court has appointed a monitor or committee to oversee the administration of a school district undergoing desegregation, *see e.g., Reed v. Rhodes, supra*, no legislative powers were superceded. While it may be accepted jurisprudence that a federal court has the power to override, in a specific instance, actions of a local legislature which are in

---

[1] See *Powell v. Ward*, 643 F.2d 942 (2d Cir. 1981) (affirming appointment of special master to oversee future compliance with orders in prison case); *Morgan v. Kerrigan*, 530 F.2d 401, 427-29 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976) (affirming appointment of Citywide Coordinating Council, which had *no* power to "co-manage or make policy for the Boston Schools"); *Reed v. Rhodes*, 635 F.2d 556 (6th Cir. 1980), *as modified by* 642 F.2d 186 (6th Cir. 1981) (affirming appointment of Administrator of Desegregation to implement remedial orders.)

violation of the Fourteenth Amendment, *Hunter v. Erickson*, 393 U.S. 385 (1969), we know of no judicial authority which would permit, in the first instance, the creation of a non-representative body which functions, in part, as a legislature.

On balance, therfore, the City cannot support the creation of a Commission as proposed by the Court.

Respectfully submitted,

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY

By:

Michael W. Sculnick

Attorneys for Defendant
City of Yonkers

1 Dag Hammarskjold Plaza
New York, New York 10017
(212) 223-1891

Dated: New York, New York
July 25, 1988

Minutes of District Court Proceedings (Sand, J., July 26, 1988)

(115) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

YONKERS, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

July 26, 1988
10:15 a.m.

Before:

HON. LEONARD B. SAND
District Judge

— — —

(In open court)

The Court: I'm pleased to report that in several respects there has been significant progress in implementation of the housing remedy orders since the parties were last before me. First with respect to the two hundred units of public housing to be built on the seven sites previously designated there has been an agreement reached with HUD and the parties with respect to the essential terms to be contained in the requests for (116)

proposals to be issued soliciting bids from prospective builders of those units. The exact language of the RFPs is being worked upon, but the substantive provisions of the RFPs have been agreed upon after an extended meeting, and I must say that the court is very pleased with the attitude of all the parties at that meeting. Although on some issues there were differing points of view the sense was that everyone was acting in a constructive fashion.

The second area in which significant progress has been made relates to the selection of the executive director for the office of fair housing implementation, and the court and the parties met yesterday with several applicants for that position. Again there was a consensus that the applicants were all extraordinarily well qualified people. We asked each applicant why there was an interest in this position and the response was uniformly that Yonkers and the housing conditions in Yonkers present a unique challenging opportunity. None of the applicants said things had been so bad they can only get better. One might read that between the lines. In any event the court will announce certainly by the middle of next week the person to serve as the executive director having conducted the interviews and having received the recommendations and comments of all of the parties. The third area in which there has been (117) significant progress relates to the affordable housing ordinance. I have been advised by the parties that after meetings and discussion there has been agreement as to the provisions of that ordinance. We had all hoped that the exact text would be available prior to the commencement of these proceedings. The mechanicals are being prepared in the Abeles Schwartz office and I am advised will arrive sometime between 11:00 and 11:30 this morning. I think the sequence in which we take up matters is significant, and what I would propose that we do is that we now adjourn until 12:30, so that we will all have had an opportunity to review the text of the ordinance, so that counsel can satisfy themselves that it is faithful to the agreements that they reached and that we can then proceed with that matter having been laid to rest. Does anyone have any problem with that sequence of proceedings?

Mr. Sculnick: Your Honor, not with respect to the sequence of the proceedings. Just a brief comment on your prior statement this morning regarding the RFP for the two hundred units. The city would like to take this opportunity to restate its position in favor of the townhouse or semi-detached style which I believe was the intent of the consent decree and our hope that through the RFP process that design eventually comes to pass. We understand the need to proceed with the issuance of the RFP (118) and understand the nature in which it will be issued, but we take this opportunity to express our hope that a townhouse style is used on all of the cites.

The Court: We're adjourned then until 12:30.

(Recess)

The Court: I have marked as Court Exhibit A of this date a document the title of which is this chapter shall be known as the affordable housing ordinance, city of Yonkers. Am I correct that each of the parties has received a copy of this document and reviewed it?

Mr. Heffernan: Yes.

Mr. Sculnick: Yes.

The Court: Are there any objections on the part of any parties to the substance of this document?

Mr. Sussman: There are a number of changes.

The Court: Court Exhibit A is a document I received from Mr. Newman and it is a typed document which has the following changes in it.

On page 3 paragraph C now reads to provide for changes in existing zoning requirements and increases in land use densities.

On page 11 paragraphs 2 and 3, one-eighth has been changed to three-eighths. That is an obvious typographical error.

On page 14 paragraph 4 the last three lines read (119) as heretofore provided in this paragraph shall not toll the rung of the 30-year period referred to in subparagraph 2 hereof. Some mechanical changes.

On page 15, paragraph C third line reads endeavor to give occupancy priority in the following order to.

On page 19 the first full paragraph third line there has been stricken the phrase a certain number or percentage of.

On page 20 paragraph 14(b) line 4 the phrase "is available to" is stricken and "shall" is substituted.

On page 21 the second sentence reads the office of implementations shall forward its recommendations to the Yonkers planning board and city council.

On page 23 paragraph P third line the word "that" is stricken.

Page 24 there is added to subparagraph U the sentence the developers shall simultaneously transmit such written statements and supporting documentation to the Yonkers board of education.

Page 25 the last two sentences are transposed, and the last sentence now reads, after the word request, otherwise the application shall be deemed approved.

Mr. Sculnick: One other change, your Honor. On page 22—this has not been discussed by the parties—subparagraph K I've been advised the proper name for the (120) register—that the proper title is state or national registers of historic places, not historic preservation, so the word preservation should be replaced with places.

The Court: That's right. Historic places instead of preservation.

My question to each of the parties then is there any objection to the substance contained in Court Exhibit A which is the document you've previously been furnished corrected in the manner that I've just indicated?

Mr. Sculnick: Yes, the city reiterates its objections made to the long-term plan order upon which this is based. We've cooperated with the preparation of this order based upon the issuance of the long-term plan order, but our objections to the substance of that order are reiterated here, which have already been ruled upon by the court.

The Court: You object to there being a long-term plan.

Mr. Sculnick: And we object to various specific aspects which I think we argued about on June 8.

The Court: But with respect to those matters which have not been previously ruled upon by the court are there any objections to the substance of Court Exhibit A?

Mr. Sculnick: No, there are not, your Honor.

The Court: And are there any objections on (121) anyone's part?

Mr. Sussman: Yes, your Honor, the NAACP objects to the documents as drafted because we feel as we've argued in papers submitted to the court that this structure should not be used, but that's a separate issue.

The Court: But I'm dealing now in terms of planning, zoning and the substantive provisions.

Mr. Sussman: No, no other objections.

Mr. Heffernan: We have no objections.

The Court: All right. That brings us to the questions of the manner of implementation. And the court has before it two proposals. There is the proposal contained in the proposed order of the Department of Justice which one might refer to as the classic contempt—the order, the notice, the opportunity to be heard and then the inposition of contempt sanctions. There is also the proposed order submitted on behalf of the NAACP which takes the route of the affordable housing commission. That is the route which says in essence Yonkers, the Yonkers city council, you have abdicated. You are irrelevant. We will proceed to implement the housing remedy order by an entity other than the Yonkers city council.

My question which I direct in the first instance to the Department of Justice and the NAACP is why should we not do both? We now have a specific document, Court Exhibit (122) A with respect to which there are no substantive objections raised by the city of Yonkers not previously ruled upon by the court. There's a very specific step which the city council of Yonkers could be directed to take—that is, to adopt this ordinance. If Yonkers' city council should fail to adopt this ordinance then as proposed in the Department of Justice order there would be what I have referred to as the classic contempt remedies including fines, personal fines directed to those responsible for the acts of contempt including possible imprisonment for civil contempt. Why should there not be in addition to or as a supplement to those classic remedies for contempt the additional potential consequence of contempt—the creation of the commission which replaces the city council. In other words, the mes-

sage to the city council would be this you must do. This you must do by a specific date. If you fail to do this by the specific day there may be visited upon you all of the sanctions set forth in the Department of Justice proposed contempt order. In addition to that the court and the parties are not going to sit by while the contempt scenario is being played out in every form it may take, but there will also be visited upon Yonkers' city council what is perhaps the ultimate sanction and that is the removal from the city council insofar as implementation of the housing remedy order is concerned, its responsibility for these (123) matters. Mr. Heffernan, do you have any problem with that?

Mr. Heffernan: Yes, your Honor, I do.

The Court: Tell me what your problem is. It is essentially saying that the court adopts and signs your proposed order but supplements it by notifying the parties that in addition to these sanctions if and when it comes about, in addition to the sanctions contained in your order there is the further available sanction which is what we call the commission route. What problem do you have with that?

Mr. Heffernan: Your Honor, obviously we agree with the first portion of that which would be the imposition of contempt sanctions. I think the problem that arises with the commission down the road is that we don't think we're there yet. We think it's important that the city retain some input into this.

The Court: You think we're not there yet. But if we get to the point, August X, if the city council shall have failed to adopt this, if the fines and other sanctions shall have continued do you preclude the possibility that we might at that stage be at the point you feel we have not yet reached?

Mr. Heffernan: At that stage I would admit the possibility of the court taking further action. Whether the commission route is the appropriate action to take I'm not (124) prepared to say at this point. I think basically, your Honor, to put out there the spectre of a commission at this point is to somehow allow the city to take the ultimate copout, to say if we wait long enough and the court is going to impose this commission,

is going once again to allow us to avoid any accountability for our actions—

The Court: Isn't that really an argument? I'm deliberately not for a number of reasons at this point establishing the roadmark—let me shift the analogy—I am not at this point establishing the triggering event which would make appropriate the appointment of the commission. What I am seeking to establish—I am simply putting the parties on notice for obvious due process reasons that this too is a possible sanction and what I am saying is Mr. City Councilman X, if you feel that it is appropriate for you to cause Yonkers as a city to suffer these fines, if you think it is appropriate for you personally to sustain these fines and these imprisonments, this potential imprisonment, and if this goes on for a period of time we're not just going to permit everything in Yonkers to go down the drain, because there is still one other thing which is available to us and that is simply to say insofar as implementation of the housing remedy order is concerned we proceed without you. I think it would be inappropriate, it would be counterproductive at this point to say but if the contempt (125) continues for X number of days, then it would be appropriate. I suggest to you that if the deadline comes and Yonkers is in contempt—I should say in further contempt, I have already stated my view that Yonkers is at present in contempt—we will certainly be all assembled together.

I'd like to make one other comment about your reference to the emergency financial control board in your order and in your memorandum. I think that that is a very appropriate reference, and indeed I have on previous occasions directed that orders and transcripts of proceedings be furnished to the emergency financial control board. I was frankly disappointed when at an earlier stage of these proceedings the city of Yonkers proposed that it be subject to a $29 million judgment if it succeeded in defeating the obligation to construct 200 units of public housing. And I had thought that that proposal was so fiscally irresponsible that the emergency financial control board would simply not permit it to be made. If there is reason, as your papers suggest, to believe that the EFCB is prepared to act in the face of what otherwise would be fiscal disas-

ter for Yonkers and all of its citizens, then it would be very welcomed and certainly again in terms of the sequence of these events were there to be a contempt—that is, a failure to adopt Court Exhibit A—and were there to (126) be a realistic basis for believing that other state agencies might intervene certainly that would be a very compelling argument against the necessity of contempt, so that really all that I'm proposing, and that's why I expressed some surprise that you had difficulty with it, was the classic contempt route, which is what your order proposes, with the additional element again as an inducement to compliance which is what civil contempt is intended to do. It is intended not to punish but to induce compliance—that, if necessary, there is available the further device of removal of the city council from further responsibility.

The other point with respect to the commission if there ever becomes an alternative is that of necessity. There would have to be some actions taken by the city council such as funding, so that I think the concern about letting the city council off the hook is somewhat diluted by the fact that they would have to fund it, and from time to time when appropriate they could be called upon to ratify the actions taken by the commission. Shall I hear from Mr. Sussman?

Mr. Heffernan: Your Honor, one last comment. It doesn't seem that what you're proposing is very much if at all different from the order we submitted to the court two weeks ago which indicated there would be a contempt fine route to be possibly followed at some point in the future.

(127) The Court: It's different in some respects and I don't quarrel with that. One significant difference in my view is that there's now a very specific discrete act which the city council can be called upon to perform. We did not have two weeks ago and we now have this ordinance.

When the court first raised and raised tentatively the notion of a commission I think I indicated then that I did not regard it as being mutually exclusive from other types of remedies—that it was simply another possible sanction.

I might also say that what the court envisioned is a radically different commission from the one contained in the NAACP's proposed order. The main virtue of the commission in my view

is the assurance given to private builders and developers that proposals that they advance will not be sabotaged or reviewed in a hostile climate. I had not envisioned the creation of an additional level of bureaucracy and whether there will ever come a time when a commission is appropriate I think we may know in a week or so. I might add that this is a matter with respect to which I would also like to have the input of the soon to be appointed executive director of the office of fair housing. But the short answer is I'm not disagreeing with your last comment. Mr. Sussman.

Mr. Sussman: The NAACF, as the court is aware, (128) strongly opposes the options which you have laid out today and I want to spend a few minutes explaining why. This is really very difficult because I'm convinced from seven and a half years that the court certainly wants implementation of the order. There's no doubt in my mind as to that. There's great doubt in my mind as to whether any official of the city of Yonkers does and whether there is wisdom in the proposals that the court has laid out and I have very grave concerns at this time as to the views of my clients and the responsiveness of the remedy process to their needs. If we were talking here about the need to have the city council of Yonkers or some administrator within the city of Yonkers do a single act the virtue of the court's proposition would be much less assailable because a civil contempt route is a time honored route, and the force of civil contempt is almost clearly such in almost every instance particularly where fines are substantial and prison contemplated to yield the desired results, but as in Cleveland, Boston, Alabama, as in so many cases where federal courts have been faced with obstreperous and hostile defendants—in Yonkers that is not the situation. We're not here talking about the doing of a single act, and for the court to rather repeatedly define the situations that we face incrementally as forcing the city to take a single act in my view is frankly totally off base. That is not what we're doing (129) here.

The fact that the city council of Yonkers would pass an ordinance under a threat of contempt or fines or bankruptcy is irrelevant, absolutely irrelevant in my view to what we're about here. It doesn't matter at all. Because of course if we start fin-

ing them $100 a day and we get to the eighth day or the tenth day and the EFB comes in and it's a big circus they'll finally take the act. So what? It means absolutely nothing. In fact that spectacle—

The Court: excuse me, I thought I made clear in my colloquy with Mr. Heffernan that day one of contempt we are all assembled together, and day one of contempt raises again the alternative of the commission, so I interrupt you because I am not precluding an application being made on day one or day two of contempt for invocation of the commission. The difficulty that I have is that the NAACP is the proponent of the commission, but unless I misunderstand your proposed order the commission that's called for in your proposed order is an advisory body. There is no affirmative conferral of jurisdiction on the commission.

Mr. Sussman: It says section one the YAHC shall be responsible for implementing the long-term housing remedy order of June 13.

The Court: Let me ask this. When I advanced (130) this suggestion I talked about a commission which would take all of the rights, powers and jurisdiction of the city council in any and all matters relating to housing pursuant to the housing remedy orders.

Mr. Sussman: That's exactly what's contemplated. In any event I think we really should focus on the principal issue here and I don't think the principal issue here relates to whether on day one of contempt or day ten of contempt we discuss the commission, because frankly I think the message that will have been sent out and has already been sent out and has been picked up by city councilmen and will be scattered throughout the city is that the commission is viewed primarily as a threat to force compliance, and the court has said that not just today but on other occasions, and frankly I think that essentially has been the court's approach. I don't say that it's not a logically possible approach. I just take strong exception at this stage in this lawsuit to the continued invocation of threats of judicial action as opposed to structural change. And I handled the Cleveland case for the Department of Justice between 1970 and 1901 and I was the proponent there for the order which was

signed and affirmed by the Court of Appeals in the Sixth Circuit, and that case doesn't frankly come anywhere close to this case in terms of the contemptuous conduct of the Yonkers city council compared to (131) the Cleveland board of education. There is simply no comparison. This city council is bent on in every way possible resisting this order, and if that message has by now not become crystal clear to everyone involved including the court, which has been the target of vituperative, untrue, slanderous comments repeatedly by members of the city council, it will never become clear in my opinion because I think there's a fundamental difference in philosophy which we have talked about before this court and myself as the NAACP lawyer.

I do not believe a judicial setting such as this has a fundamental responsibility to ensure that the defendant complies. I don't believe that's the central issue. It would be good if they did. It would be optimal if they did. There's no disagreement as to that. But the fundamental need of judicial power in this situation is to ensure rights, and if that occurs through traditional structures it is preferable, but there cannot be as there has been here continual delay with respect to their coming around. It gives them far too much power and clout.

I want to repeat just briefly a few of the reasons, and I take this from what's been said in this court already. This court said if and when it comes about—as understood the reference was to contemptuous conduct—the court later said correctly that the court has observed (132) previously that contempeuous conduct has long since (illegible) here and it has. For anyone to argue that in light of the history would be preposterous. No order of this court that relates to the production of housing in this case has been followed, period. They may have been ultimately followed and the court after a lot of delay has pushed the city to the wall and then we've made a step. So the fundamental challenge is recognizing intellectually that we're not talking about having somebody do one act. This is not, as courts are often dealing with—produce these documents, if you don't you're going to jail. This is the total polar situation here. What we're dealing with here is the implementation of a complex order and creating a structure that will do that. There is no

reason to believe that if the city council passes this ordinance it will mean in the situation that is being created, which is if you don't you'll be fined, personally, the city, contempt, jail and all the rest—that will have any significance whatsoever for the city of Yonkers in implementing this order. In fact it will simply create a precedent that every time you want to do something we should push them to that wall. That is craziness. It is not intellectually honest at this stage of the lawsuit to move back from the structural change necessary. It sends the black community and the Hispanic community the worst possible message, which is that forever (133) these people can get away with it, and the court will simply not act. I think the court thinks it's acting. I recognize the court feels that it's using judicial authority with patience and I've applauded that on other occasions. But we're not now there. We're not now allowed so much rope for the city in my opinion.

I want to say a few words about the government's position because I think it needs saying. In Yonkers as in every other municipality on the federal level power is what counts. Who wields the power to make decisons? That's what matters. To say that depriving people who have stalled something because they've had the power to stall it, depriving them of that by creating structural change is not to impose strong sanctions is entirely paradoxical. It is, as the court noted, the strongest sanction. The only question from my point of view legally is whether the court has to take the other steps before setting up the commission, and I've cited cases which I believe show it does not nor does it have to find the city in civil contempt though it certainly could. It needn't as Judge Carrity noted take such measures when they will be counterproductive. And that has been my point for a year and a half on the issue of sanctions and jail. We don't need to pay attention to Henry Spallone. His position on these issues—I assume they're based on principle—have (134) been overruled by this court. He can continue his opposition. He can continue to speak against the proposals. I'm sure he will and as an American citizen he has a right to do it. The same is true of Mr. Odom. The fact of the matter is that these people cannot continue to interpose delays. That is beyond the scope of their ability and it ought to be. But

that is precisely what we let them do when we say we're going to have a process and in a week you either pass it or we'll have a hearing. Maybe we'll do something else, but from the history of this case we probably won't, so I think the fact is we have a very critical choice to make.

Obviously I'm pleased that the court is not squelching entirely the view of having a commission, but I feel the spectacle that will be created will be a distraction. It is irrelevant. If it were relevant to telling us that there will be future compliance with the nitty-gritty day to day implementation it would be something, but it's not. To get the implementation you need people who are committed to doing it. And frankly as long as those in Yonkers in administrative positions are controlled budgetarily in terms of their career ladder by the Yonkers city council and they indelibly are, we can't assure that. And I don't believe that the minority communities should see the long-term plan sabotaged. After (135) they pass the resolution, then they have control of it, than they sabotage, then we're back. I don't think we need to see that. We have every indication from their action that they will not perform in good faith. And I respectfully disagree as I said and I urge the court to reconsider.

The Court: Mr. Sculnick.

Mr. Sculnick: Very briefly, your Honor, addressing the specific proposal made this morning for in a sense going down both routes, as to the first route the proposed order submitted by the government in the context of this case, I think the city's position is that imposing fines or the threat of fines and imprisonment would be more punitive than remedial. In some respects some of the arguments made by the NAACP but I think from a different perspective—

The Court: Then you have an obligation. If you say that, then you have an obligation to affirmatively endorse some other proposal. You oppose both the contempt and the commission, and that really does not provide very much guidance to the court.

Mr. Sculnick: I think the city does oppose both. I think that's correct and I appreciate your position. But the reason the city opposes both is that in the first instance the threats of con-

tempt and fines are not remedial and in the second instance the suggestion of the (136) commission—as I stated in our paper the city council is obviously not in a position to consent to such a commission since it would be divesting important legislative functions, and the case law simply does not support in our view the wresting away of legislative functions as opposed to purely administrative functions.

The Court: Mr. Heffernan.

Mr. Heffernan: Your Honor, if you will indulge me for a few minutes I feel compelled to respond to what Michael just said. The government and the NAACP have a basic disagreement here. We have a basic disagreement going towards the same end. The city basically doesn't want contempt sanctions, the commission. They hope the case will go away. It's not going to. We believe, your Honor, it's somewhat naive to think that even with the creation of the commission city council, city officials are somehow going to be removed from the pervasive link of persuasion and influence which to date has stymied the remedial process in this case. Quite the opposite. We believe that failure of this court to move forcefully right now to take action to make sure that its orders are obeyed will only strengthen the opposition, the obstruction, and will basically allow city officials to continue to openly enflame community opposition. It's easy to say that the city council—let them yell and scream, say what they want, you know words (137) aren't going to hurt you. But here, your Honor, the words of language, Henry Spallone or Nick Longo, are more than words. They're rallying cries. They're a call for defiance. And that's why we believe the contempt sanctions here are very, very important to continue the remedial progress in this case.

Mr. Sussman: Your Honor, can I respond to that very briefly?

The Court: Okay.

Mr. Sussman: One is that the post-order of the NAACP provides on page 5 section 6(a) personal sanctions for persons either who do not comply, city agents or employees who do not comply with requests from the executive director and additionally for anyone who interferes with the discharge of the

YAHC's duties, and I don't think it is fair to say that we would simply blink at that in that context. We would not.

The Court: I have some other problems with the NAACP's proposed order. There's no provision for appeal to the court. I have problems with a one-year moratorium on relief from the commission. But I don't think it's necessary to go into them. I'm still of the opinion that in a given set of circumstances the commission is not only the appropriate route but the only meaningful route to take. As I listened to you both I'm reminded of what is probably the (138) oldest joke in the legal profession about the judge who listens to one side and says you're right, and then listens to the other side and then says you're right. Because I think there is great strength in the views that you have each expressed. You disagree as to which are the most compelling sanctions. And my response is that we will use any and all appropriate means to implement the housing law.

Our object is not to establish abstract principles of law. Our object is not to create political martyrs or heroes. Our object is to get the housing bill. You're quite correct, Mr. Sussman, that if there is a begrudging adoption of the housing ordinance and then a practice in and pattern of frustrating implementation that is something which the court will have to address, and certainly the first directive that will go to the executive director of the office of fair housing implementation will be to alert the court at the very first sign of any such action.

In many respects the difference between the two views on the calendar may be expressed as a difference between this week and a week from now. I think there need be no concern on the part of the class on whose behalf this action was brought as to the firm commitment of this court to implementing the housing remedy ordinance. I've said on many occasions that if federal civil rights remedial orders (139) can be defeated by local political hostility we no longer live in a government of law. I do not waver from that view. The difference becomes a question of timing. This court will sign the proposed order submitted by the Department of Justice. That order provides in paragraph 1 that the city of Yonkers is ordered to enact on or before August 1, 1988—that's next Monday, that's not some vague period in the future, that's next Monday—the legislative package relating

to the long-term plan as described in section 17 of the first remedial consent decree in equity which is of course Court Exhibit A. In the event that Yonkers fails to enact that provision on or about August 1 at 10:00 a.m. on August 2 we will hold a hearing as to why it should not be held in contempt.

I agree with you, Mr. Sussman—you were agreeing with my earlier comment—that Yonkers is already in contempt. I cannot quarrel with the obvious intent and purpose of this order and of the Department of Justice given the law with respect to contempt to comply—

Mr. Sussman: I agree with that.

The Court: Very well. The sanctions with respect to contempt are the fines which we have previously talked about which by shorthand we have referred to as the bankrupting fines, because they would indeed bankrupt the city of Yonkers in a very short period of time. I want to (140) reiterate the fact that those fines are paid into the treasury of the United States. They are not put into an escrow fund. They are not subject to return. It would take an act of Congress to restore to Yonkers those fines. These are not fines such as occasionally are imposed in a labor dispute where everyone knows that once the strike is settled the first thing that happens is the fines are returned. If anyone has any doubt as to the power of the court to impose such fines I respectfully direct your attention to United States v. Marc Rich.

I advise the parties—and I note the presence in the court not only of outside counsel for Yonkers but of the corporation counsel—that it is the court's intention in addition to the specific sanctions set forth in the order which I am now signing to consider the promulgation of a commission. The precise membership of that commission and other provisions with respect to it, I think, require some further thought and analysis. But the road to implementing the housing remedy orders is going to be a direct and expeditious road and it would be foolhardy for anyone to think otherwise.

Let me just announce that there will be a conference on August 4 at 2:00 o'clock with respect to the school board and the pending matters relating to the school board's motion.

(141) Mr. Sculnick: Your Honor, I just wanted to clarify that the order that's been signed contains—that is the exact proposed order that was submitted by the justice department—in other words, it contains notice not only to the city as a corporate entity but also to the city council members in their individual representative capacities that failure to adopt Court Exhibit A will result in potential fines and imprisonment.

The Court: It is the order exactly as submitted together with the document headed comments of the United States filed with the court on July 25, 1988. Anything further?

Mr. Sussman: Yes, I'd like to make as exhibits to today's proceedings two letters. One is a letter that I wrote to Mr. Pickelle, on July 20, 1988, inquiring as to the status of the four privately held parcels with respect to the eminent domain proceedings. I have a copy of that. And the second is a letter from Mr. Pickelle to me, of July 21, 1988, in which he reports as to the status, which I think is relevant for the record.

The Court: Very well. They'll be marked NAACP's Exhibits A and B of this date.

Mr. Sussman: And deemed part of the record for any appeals as may be necessary.

The Court: And deemed part of the record in this (142) case. I have a number of matters on my calendar next week. I will set them all aside if need be. Every participant in this case must either be available next week or have a representative present. We are in all senses in what I regard as an emergency situation, and it is to be treated as such. Anything further? Thank you.

Order (Sand, J., July 26, 1988)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
YONKERS BRANCH--NAACP, *et al.*,	)	80 CIV 6761 (LBS)
	)	
Plaintiffs-Intervenors,	)	
	)	
v.	)	
	)	
YONKERS BOARD OF EDUCATION, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Part VI of this Court's May 26, 1986 Housing Remedy Order required the City of Yonkers to submit, by November 15, 1986, along Term Plan for affordable housing units. It is beyond dispute that the City has defaulted in this obligation. Specifically, the City of Yonkers refused to submit such a plan on November 15, 1986. Furthermore, despite its agreement in the January 28, 1988 First Remedial Consent Decree in Equity to adopt "no later than 90 days after entry of (the January 28, 1988 decree)" a legislative package of incentives for developers to encourage development of 800 units of affordable housing, and this Court's entry of the Long Term Plan Order of June 13, 1988, the City has failed and refused to enact such legislation. On June 28, 1988, the City Council defeated a Resolution stating that the City would enact such legislation. In its Memorandum filed on July 11, 1988, the City further stated that "the City has indicated by the defeat of the Resolution . . . that it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order." City of Yonkers Memorandum of Law in Opposition to Plaintiffs'

Proposed Order, p. 4. This Court will tolerate no further violation of its lawful orders and accordingly enters this Order.

1. The City of Yonkers is hereby ORDERED to enact, on or before August 1, 1988, the legislative package relating to the long-term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long-Term Plan Order dated June 13, 1988.

2. It is further ORDERED that, in the event the City of Yonkers fails to enact the legislative package on or before August 1, 1988, the City of Yonkers shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why it should not be held in contempt, and each individual City Council member shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why he should not be held in contempt.

3. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, 1988, and the City cannot demonstrate why it should not be held in contempt, beginning on August 2, 1988, the City shall be subject to daily fines until such time as the City has purged itself from contempt by enacting the legislation. The City's fine shall be $100 for the first day and the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that the City eventually ceases its contumacious conduct.

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the Council members who fails to vote in favor of the enactment of

such legislation, and has not demonstrated why he should not be held in contempt, shall be personally fined $500 per day every day (but not doubling) until such time as such individual has purged himself from contempt as described below or the City has enacted the legislation. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and shall be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that an individual ceases his contumacious conduct. Fines imposed by this paragraph shall be paid personally by each individual Council member and under no circumstances shall any City funds be used or appropriated for such purpose. An individual may purge himself by voting to enact the necessary legislation. However, if the legislation is not passed and on any subsequent vote such individual again fails to vote in favor of the legislation, he or she shall once again be personally fined $500 per day until such time as the individual has once again voted in favor of the legislation or the City has enacted the legislation.

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988, any Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United States Marshall for imprisonment until such time as the City has enacted the legislation or such member has purged himself from contempt as provided in paragraph 4. The fines described in paragraph 4 shall continue during any time of imprisonment.

6. It is further ORDERED that the Mayor of Yonkers shall convene a special session of the City Council for the purpose of voting on the legislative package at least once a week beginning on August 1, 1988, or more frequently if so requested by any Council member. Any Council member who is imprisoned pursuant to paragraph 5 above shall be released

for the purpose of attending such meetings and for no other purpose.

7. It is further ORDERED that the City shall forthwith deliver a copy of this Order to the New York State Emergency Financial Control Board for the City of Yonkers.

8. It is further ORDERED that the Mayor of the City of Yonkers shall by August 1, 1988 post in a conspicuous place in all public buildings a copy of this Order together with the following notice:

All employees of the City of Yonkers are hereby put on notice that failure to comply with, or interference with implementation of, the court order attached herewith may subject any employee of the City of Yonkers to personal contempt sanctions imposed by the Court.

It is so ORDERED, this (26)
day of July, 1988

/s/ Leonard B. Sand
United States District Judge

(1:30 p.m.)

Letter of Judge Sand, Dated July 28, 1988

Re: *U.S.A. v. Yonkers, et al.*

TO ALL COUNSEL:

With respect to this Court's Order of July 26, 1988, that specific Order of the Court will be satisfied if the City Council, on or before August lst, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

Regardless of what action the City Council does or does not take on or before August lst, counsel for all parties are to appear before the Court on Tuesday, August 2nd, at 10:00 a.m.

At such time, if called upon, they are to be prepared to state their views with respect to the enclosed proposed Order.

Very truly yours,

/S/ Leonard B. Sand
United States
District Judge

(Dictated but not read
by Judge Sand on 7/28/88)

Minutes of District Court Proceedings (Sand, J., August 2, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

and

YONKERS BRANCH NAACP, ET AL.,

Plaintiff Intervenor

-against- 80 Civ. 6761 (LBS)

YONKERS BOARD OF EDUCATION, CITY OF YONKERS, and YONKERS COMMUNITY DEVELOPMENT AGENCY

Defendants
----------X

August 2, 1988
10:00 a.m.

THE COURT: I have attempted unsuccessfully to obtain a larger courtroom for these proceedings and I understand there are people outside who cannot be allowed in because we are filled to capacity. I regret that. There are many other matters that are taking place in this courthouse today.

This court entered an order on July 26, which among other things ordered the City of Yonkers to take certain action on or before August lst and provided that if that action were not taken, this hearing would be held to show cause why the City of Yonkers should not be held in contempt and each individual city council member shall be required to show cause at a hearing before this court at 10:00 a.m. on August 2 why he should not be held in contempt.

For the record, Mr. Sculnick, did the city of council on or before August lst take the ordered action?

Mr. Sculnick: They took two actions last night. First a public hearing has been set for August 15 on appropriate notice under state law to have a public hearing, after which the city council would be entitled to vote on the zoning ordinance that has been required under the court's long-term plan order. And with respect to a resolution of intent, to adopt that ordinance, the city council defeated that resolution of intent by a vote of 4 to 3 last night.

THE COURT: Are there present in the courtroom this morning the four members of the city council who voted against the resolution of intent?

MR. SCULNICK: Yes, there are. In fact all members of the city council are present in the courtroom today.

THE COURT: Very well.

Mr. Sculnick, I will hear you with respect to why the city of Yonkers should not be held in contempt. You may proceed.

MR. SCULNICK: Your Honor, I am here today representing the municipal corporation of the city of Yonkers not the individual council members. With respect to the City of Yonkers and in that regard, your Honor, when I refer to the City of Yonkers, I mean to refer to the municipal corporation. When I refer to the city council, I will do so specifically.

The city opposes the imposition of fines or other contempt sanctions for three reason: First the city has urged for at least the last three or four weeks that this unnecessary and regrettable confrontation between the federal court and the city council. The city urged back in July, at the hearing date on July 12th I believe, the return date for the joint motion by the NAACP and the government for the proposed order that was proposed by them on July 5th.

THE COURT: But the city offered no affirmative proposal?

MR. SCULNICK: That is not true. The city suggested that the court could order the adoption of the zoning

ordinance just as it had entered orders for the housing remedy order in May of 1986, just as it had entered the long-term plan order in June of 1988.

THE COURT: The city's sole proposal was that the city do nothing, but that the court and court alone act. Is that accurate?

MR. SCULNICK: With respect to the adoption of the zoning ordinance, that is correct. After the city council had failed to adopt the resolution of June 28th that had been suggested by this court, that was the suggestion made by the city.

As a result of the court's decision to enter the July 26th order which is the basis for the hearing today, that order sets forth should the city council fail to adopt the zoning ordinance, fines would commence against the City of Yonkers in the amount of $100 per day for the first day doubling each day thereafter.

The city submits that fines of that magnitude are devastating and will bankrupt the city within a matter of approximately three weeks probably effectively sooner than that. In addition, we have been notified by Moody's Investor Service, one of the bond rating agencies, they issued a credit report on July 29th, which indicates that depending on the outcome of last night's vote that the outcome of any proceedings today, that they would take "appropriate action" with respect to the city's bond rating.

We believe that in reference to appropriate action means either the suspension of the city's bond rating or actually lowering the city's bond, which is B-AA, which is the lowest investment grade under the Moody's rating system, Any lowering of that bond rating or the suspension thereof would completely preclude the city from access to the capital markets.

That would have extraordinarily negative consequences for at least two reason: first of all, it would prevent the city from carrying forward any existing capital projects. It would increase the cost of any other borrowing; and lastly, your Honor, and I would urge the court give serious consideration

of this matter, it would effectively preclude the city from financing any other aspects of this court's remedial order including the two new schools.

With regard to the punitive nature of the fines, your Honor, the city urges that they are punitive rather than remedial in that they do not necessarily induce compliance.

THE COURT: What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day isn't going to bankrupt Yonkers. The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

MR. SCULNICK: Your Honor, may I respond to those comments?

THE COURT: Yes.

MR. SCULNICK: First of all, I just want to make it clear that no group other than the city council can vote to bring the city into compliance. In other words, the nature of the act which the city has been directed to take is to amend the zoning ordinance.

THE COURT: But there are measures which can be taken by institutions other than the federal court to comply compliance. The governor, for example, under the Yonkers City Charter, the governor has the right to remove any elected official who engages in improper conduct.

MR. SCULNICK: That is correct. And just last week, your Honor, in an attempt by the city manager to induce the city council to comply with the court's orders, the city manager wrote a telegram to the governor seeking the governor's assistance and good office in trying to encourage the city council to pass the resolution on the agenda last night.

The governor's office responded saying that it hoped that the city council would pass the legislation, and, therefore, deemed any action at this point premature.

THE COURT: What I am trying to say--

MR. SCULNICK: That the city manager in this administration has taken good faith steps within their power to achieve compliance with the court order.

THE COURT: The city manager is not the person who is subject to this order. His good faith is not an issue.

MR. SCULNICK: He is the chief administrative officer of the city, and I put on the record and before this court's consideration that he has taken efforts to comply with the order; and, therefore, given the efforts by the city's administration to comply, I urge that imposing fines against the city would be unfair and unnecessary and in the respects that I have previously indicated punitive.

THE COURT: I would like to know a little more if I may about the communication to the governor. Was that in the nature of a request that he use his good offices or was that a request that he exercise powers and responsibilities that he has as the governor of the state under the circumstances which now obtain?

MR. SCULNICK: Your Honor, I don't have that with me, but I believe it is the former. The governor would be requested to use his good offices, not the latter.

THE COURT: This is for the record because I understand copies of the Yonkers Charter are difficult to come by.

MR. SCULNICK: I am aware of that.

THE COURT: It took some time for you to produce a copy. Section C 2-5: "Removal from office. Any elected officer...may be removed from office for misconduct or malversation in office by the governor in the same manner as sheriffs."

You may continue. You were saying punitive nature, and I was responding that the form of the fines was very intentionally drafted to be remedial and not punitive. That is the reason why they start at the very modest level, simply to put everyone on notice as to what will inevitably occur unless there is either compliance or the intervention of some supervening authority.

Now, you are urging that the federal court adopt the ordinance and do that which it is the responsibly of the city council to do. There are a number of difficulties with that. One is that the federal court should act only when it is satisfied that there is no responsible state or local authority that will act.

The second reason is perhaps philosophical or symbolic and that is there does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Now, it was probably two years ago that I suggested to the city council that if it could not discharge its responsibilities, it could delegate those responsibilities. Those were in the days when we heard that Yonkers was suffering from political paralysis because half of the city council people were running against the other half of the city council people. Those days are gone.

The delegation suggestion then resulted in the appointment of the outside housing advisor. I recently suggested a commission. The commission can originate not only by an order of this court, but can originate from the city council itself.

It has chosen to do none of these things. It is simply saying no. And that is a very distressing circumstance. What is very peculiar here is if one landed from Mars and came to

this courtroom at this stage of the proceedings, it would be very difficult to understand what is happening.

What is most perplexing about this is that in the whole history of this litigation, these eight years, all of the controversy over the schools and all of the controversy over the 200 units of public housing, the least controversial issue seemed to be the affordable housing ordinance. The text of that ordinance was drafted by experts for the City of Yonkers, the provisions in that ordinance for the most part embodying matters which were agreed upon during that brief euphoric period of consensus.

But perhaps it is the realization that the affordable housing ordinance presents the most realistic and greatest opportunity for accomplishing the remedial purpose of this order which causes this to be the issue which the city council puts itself in the position in which it finds itself this morning.

MR. SCULNICK: Your Honor, may I respond to some of your comments?

THE COURT: Please do.

MR. SCULNICK: The first issue that you raised is that the federal court should act only when there is no responsible state or local authority that will act. In this case only the City of Yonkers is a defendant. So I think it is taking a comity a bit too far to say if other responsible state authorities fail to act. I think that is putting an unfair burden on the state's responsibilities.

THE COURT: Unfair burden on the state to have a responsibility when a city of almost 200,000 people totters on the brink of bankruptcy, makes itself a symbol of defiance to a federal court, acts in a manner which is so devastingly adverse to the interests of its citizens? Is it too much to ask of state officials that they respond to that type of an emergency?

MR. SCULNICK: I think it is one thing to say that they should be invited to participate. It is another thing to say that the court should refrain from taking action which it is empowered to take awaiting the state taking their steps.

My only point is that I don't think that the principal you have enunciated should prevent this court from taking the steps that the city urges, that is, the promulgation of the zoning ordinance.

THE COURT: We get into an Alfonse Gaston -- if I can use that inappropriate reference -- between this court and the Emergency Financial Control Board which I know is carefully monitoring this case and has its representative present at all times. The Emergency Financial Control Board awaits this court's action. This court awaits the Emergency Financial Control Board's action and nothing happens.

When the City of Yonkers made an application to this court and said, "We will consent to the entry of a judgment against us for $29 million not to build 200 units of public housing we had agreed to build in 1980 and which would be built with federal funds," when the City of Yonkers took the position, it is clear that it crossed the line of any form of fiscal or other governmental responsibility.

So what we are confronted with, and I don't fault the city manager, what we are confronted here with really is a total breakdown in any sense of responsibility. What we have here is competition to see who can attract the greatest notoriety, who will be the political martyr and without regard to what is in the best interests of the City of Yonkers.

MR. SCULNICK: And that is exactly why, your Honor, we urge the court not to take the steps which would give the counsel members who chose to vote no that notoriety.

THE COURT: Has the City of Yonkers made an application to the Emergency Financial Control Board? Has any representative of the City of Yonkers said, "We cannot govern the City of Yonkers in a fiscally responsible fashion, step in. We welcome you to do so."

MR. SCULNICK: No, and I don't think that can be expected of a government. How can any government advocate --

THE COURT: Harry Truman said, "If you can't take the heat, get out of the kitchen." If the city council can't function, then it should acknowledge the fact that it can't function. If it can't follow federal law, lawful federal court decrees, and if it can't function in that fashion, then it is a nonfunctioning entity. And at least it should have the responsibility to acknowledge its own inability.

MR. SCULNICK: Your Honor, I guess we have debated civic issues before, but I think that would quite frankly be the last thing in my opinion that the city council would do: To vote to go out of existence on this kind of issue. I think that is unrealistic.

THE COURT: You think it is unrealistic for the city council to say, "We are at an impasse. We are at a point where unless some other action is taken, Yonkers will be bankrupt. It will lack the ability to borrow money essential to the functioning of any community. It will involve a massive curtailment of all forms of public service. This we cannot permit to happen; therefore, let us recognize that we can't function. Let us establish a commission. Let us delegate to the commission. Us, the city council, by our act, not an act imposed upon us by a federal court. We, by our own act, create the commission and we bind ourselves to adopt and comply with its determination"?

MR. SCULNICK: Perhaps that question is best asked of the council members.

THE COURT: Yes. Is there anything further you wish to tell me why the City of Yonkers should not be held in contempt and why the court should not impose upon it the fines and sanctions contained in the July 26th order?

MR. SCULNICK: I think in summation your Honor, the imposition of the fines proposed in the court's order would have the effect of severely damaging the city's financial posture, but it would be to the detriment of every Yonkers citizen. And in that respect and in that respect in particular, we urge that in effect it punishes the innocent, that it doesn't necessarily coerce compliance by the council members, but it would injure all citizens of Yonkers.

And as a result, we respectfully request the court refrain from imposing fines against the city and not follow through on that proposal. Thank you.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Good morning, your Honor. Your Honor, we find ourselves in a very unfortunate situation once again. And the United States believes this court has no choice. It has to act. The City of Yonkers and four members of the City of Yonkers' council have acted clearly to defy this court and defy this court's order just as they have in the past.

The court's order is clear. The court's order is unambiguous and there has been clear defiance. Your Honor, the sanctions here are clearly not punitive. As the court said before, it is a classic contempt situation. The court and plaintiffs here are not here to punish anybody. It is not the obligation of the United States here to fine somebody, to imprison somebody. It is our obligation to see that the orders of this court are obeyed. That is why we have proposed the order which the court entered last week. And that is why the court has to today take the strong action necessary to comply compliance with its order.

The contempt sanctions here are clearly coercive. They will end when the city and city council comply with the court's order. They hold the keys to purging the contempt.

Your Honor, the city's argument that you can somehow divorce the city from the city council, from our perspective borders on the ridiculous. Under the city's view of things, once again it should not be held accountable for actions of its officials. Under that view, your Honor, it may well be the case that it shouldn't be held accountable for the constitutional and statutory violation found by this court over two years ago because it wasn't the city which took those actions, it was the city elected officials and the city's employees. That argument plain and simply has no merit.

The city has to be accountable for this court and obey the orders of this court, and the contempt sanctions must be

imposed as the court has ordered. Your Honor, it is our strong belief that if those sanctions are imposed, compliance will be coerced and the remedial process can go forward.

THE COURT: Mr. Sussman.

MR. SUSSMAN: Your Honor, may it please the court, as the court is aware the NAACP has previously taken a view in counsel to the court that the imposition of fines and potentially jail sentences might not work, but that should not obscure the issue we are here today on. The issue we are here on today in terms of the legal test is whether as Mr. Heffernan has said the fines and the potential jail sentences are in fact meant to be coercive or punitive.

And on that legal issue, it seems to me obvious that whether I believe as council for NAACP that the measures will work or will be effective in getting long-term compliance is not the issue. It is the court's intent and belief which is clear that they will be. Therefore, that combined with the fact that the condemnor, the City of Yonkers, holds the key to its own liberation so to speak from the fines and potential jail sentences makes these fines clearly remedial and not punitive.

Any reviewing court looking at the situation should clearly be able to distinguish it from the situation that we happened when waiting for a Second Circuit argument in the case two weeks ago in which the court of the Eastern District of this circuit imposed 15 day jail sentence upon a party, but there was no act that party could take to free itself from the jail sentence. The Court of Appeals was looking at that and wondering how that could be deemed remedial. This is clearly not that case. This is remedially intended sanctions.

I just want to make a couple of other comments. I think what Mr. Sculnick enumerated in terms of the harms to the city are like the city's willingness to spend $29 million to get out of building 200 units of housing. What those statements do in my opinion is not provide a reason or rationale for why sanctions are inappropriate, they show the actual measure and extent of the contemptuous conduct.

If the city here, four members of the council are willing to bankrupt Yonkers rather than to let 4000 units, 3200 of which are intended for market rate users, be built, that only is a measure of the enormity of the hatred which exists. It is not an argument against contempt.

Let me speak to the distinction which is in the papers the city today tries to draw. Yonkers city council and the state law, your Honor, is the governing body of the city of Yonkers. The city administrator or city manager and comptroller and other officials are merely employees of the city council. That they have here been somewhat independent and somewhat more progressive is irrelevant legally because the legal entity in Yonkers which can act is not the administration. It is the city council. Mr. Heffernan I believe is accurate in saying that that distinction has no legal merit.

Finally, I believe, your Honor, and I just want to reiterate the point made in the last court session that while the sanctions here must be imposed, the court cannot be seen as having made these threats and backing away from them. They are clearly legally justified. In our judgment they are insufficient, and I think that is perhaps the central issue that we may talk about later today.

What we had last night in the acting out and the attempt to not let others into the city council meeting who have a different point of view, and all of those tactics which frankly in a democratic society are regrettable, what we have is a continued demonstration that the city council cannot implement.

Your Honor used the term advocating governmental responsibilities. Of course the city council won't make that declaration because it is not advocating government responsibility. It is doing the will of the people. The court has posed a paradoxical situation. From the court's point or view and perhaps my point of view, they are not governing consistently with the constitution. But from their point of view, they are at the pinnacle of efficacy. And that was the rationale of Mr. Fagan, one of the condemning parties used in explaining his vote.

He said, "I wasn't going to make clear my view until I came and saw how the people wanted me to act." It is the same thing that Cipriani and Longo said in 1982 regarding School 4. The same reference is used and in their mind they are governing with great efficiency and great fairness to their people.

The point I am making is that as long as that is the reference -- and I believe it continues to be the reference -- another structural change is required or else the City of Yonkers believing that it is governing truly to the wishes of its people will continue to act in contempt and we will not get housing built. And frankly that is their goal. So they become in a sense the winners.

I think the contempt is clearly justified against the city. This court would be fully within its legal responsibilities and rights and authority to impose contempt and the prudential consideration which I have otherwise urged against do not apply because the court order isn't stayed. I want to make that distinction. Thank you.

THE COURT: Anything further with respect to the City of Yonkers?

MR. SCULNICK: Just briefly, your Honor. Just addressing the distinction between the city council and the city, those kinds of distinctions are made all of the time in the law, and I think that they are especially forceful in this case where the city council members while elected and have the authority to take specific actions under state law, there are greater manifestations of the city at large. There are the citizens, the employees of the city, and the people in the city who depend upon the city services.

The city administration takes responsibility to implement its objectives in providing city services. So that I think that in many respects those distinctions are valid ones. It is a distinction we have long recognized between a corporation and its board of directors, and I think that that analogy is somewhat applicable here.

So although it is true that only the city council under state law is authorized to take the actions that this court has ordered, for that very reason, it is unfair to fine the city since but for the action of its council members, the city is powerless to comply with the court's order. Therefore, in that sense, the fines will have a disastrous impact on innocent people who are unable to actually effectuate --

THE COURT: A long time ago I used the analogy of a factory that was spewing out polluting fumes to a community and was ordered by a court to cease contaminating the community. The response was, "well, we presented this to our board of directors and we couldn't get a majority" or I think the analogy was, "we are split 4 to 4."

MR. SCULNICK: In that case the plant manager could have turned the plant off. There were actions that could have been taken to comply with the court order.

THE COURT: Turn off the City of Yonkers? Some people are bent on just that course.

MR. SCULNICK: That is indeed an unfortunate result that may obtain and that is exactly why we are urging that the city not be fined itself. Thank you.

THE COURT: The following constitutes the findings of fact and opinion and conclusions of law of the court with respect to the City of Yonkers and whether pursuant to this court's order of July 26, 1988, it should be held in contempt. It is important to recognize at the outset the true significance of this proceeding. It would be difficult to imagine a clearer challenge to the constitution of the United States and to a government of law than that presented this morning.

If a federal court order designed to remedy racial discrimination can be flouted by a municipality because that is what appears to be the course of political expediency, then we no longer live under a constitutional form of government. Then one has to put an asterisk to the constitution and say, "Provided, however, that if the community is sufficiently hostile to remedial action designed to insure and protect these rights, then all bets are off."

The magnitude of the issue before this court is no less than that. The tragedy of this is that the victims of all that has happened are the citizens of Yonkers including, of course, the members of the class on whose behalf this action was brought. The extent of the resistance by the City of Yonkers and its elected officials and segments of its population to the enforcement of remedial order of this court is unprecedented, and yet this is the same community which in other contexts has shown that with responsible leadership and a well motivated staff, much can be accomplished.

I refer to the experience with respect to the school orders which we will address later this week where there is every reason to believe that in good faith the responsible officials have been carrying out the court's orders and with results which exceed expectations, and it is the same city.

The city council of Yonkers has chosen deliberately to defy the court with respect to an aspect of the remedy proceedings which have in fact been the subject of very little controversy. The City of Yonkers through its council has represented to this court that there are no substantive objections to the affordable housing ordinance.

It is separate and apart from the public housing issues and all the controversy which surrounded the designation for the sites for that housing. It is very clear Yonkers has said, "We alone among the communities in this country will not obey federal court orders because we perceive -- we, the elected officials perceive that it is politically to our advantage to do so." We will address later this morning the question of individual responsibility of individual city council members.

The court finds that the City of Yonkers has been given adequate notice of these proceedings and an opportunity to be heard. The court finds that the City of Yonkers is in contempt and indeed this is but the latest of a series of contempts, but this is the most immediate and most clearly defined. The court rejects the contention that a dichotomy can be drawn between the city and the city council. We addressed at some length in our liability opinion this question of the spreading of authority

among different entities with a hope that responsibility will be escaped by all.

The City of Yonkers is in contempt because it intends to be in contempt. No claim is being made of any procedural defect. No claim is being made of a failure to understand or perceive the consequences of the contempt. Yonkers chooses to place itself in contempt and the consequences of that are the responsibility of Yonkers and those who speak on its behalf. Accordingly the court finds that the City of Yonkers is in contempt and the court then, therefore, imposes upon Yonkers the fines beginning on August 2, 1988, set forth in paragraph 3 of the order of July 26th.

Therefore, there is to be delivered no later than 4:30 p.m. today to the clerk's office the check payable to the clerk, Southern District of New York. That is the responsibility under this order of the city manager and I am sure there will be compliance with that. Those fines will continue doubling each day.

MR. SCULNICK: Point out clarification on just that last sentence. My reading of the order indicates that today is the first day that the city be held in contempt, that the check is to be delivered no later than 4:30 tomorrow reflecting the fine imposed today. Is that correct?

THE COURT: Yes. That is correct.

Now, the question raised then is how long does this continue? It will continue as long as the city council continues to defy the order of the court and the fines will mount. This court is open at all times to any application that may be made based on a change in circumstances which would warrant a change.

I repeat -- I say it over and over -- that this court is not the only institution which has the responsibility for protecting and enforcing the constitution and the laws of this land. As so often happens, it is the very people who do not come forth when they have the responsibility to act who are often heard to talk about federal judicial activism. I believe no court has

strained harder or with greater patience to defer to state and local government than this court has done.

The other officials of the state who have taken oaths to protect and defend the constitution, the members of the Emergency Financial Control Board and all others are on notice: The course on which Yonkers is headed is clear.

Let me make one other point with respect to the fines that perhaps I had not made clearer at an earlier date. I think Mr. Sussman on behalf of the NAACP at on point expressed a concern that there would be a period of contempt and then a period of compliance and then a further period of contempt. I want to make it clear that it is this court's intent that if that occurs, then, of course, the level of subsequent daily fines picks up at the point at which it ended as a result of any previous finding of contempt.

Anything further with respect to the City of Yonkers?

MR. SCULNICK: Yes, the city would apply for a stay of the court's finding on contempt and imposition of fines and the city would make the following specific suggestion in that regard: As I indicated earlier today, the city council took two actions last night. One of those actions was the setting down for public hearing of the zoning ordinance and a public hearing to be held on August 15th. The city would suggest that the fines against the city be stayed until August 15th, and that if at that time the council fails to adopt the ordinance, that at that point the fines would resume as compounded for the intervening time period.

THE COURT: Mr. Sculnick, seated behind you are all of the members of the city council of Yonkers. Are you making a good faith representation to the court that if such a stay were granted, you have reason to believe that on August 15th, the ordinance would be passed? Are you making such a representation?

MR. SCULNICK: No, your Honor, I don't have the factual basis for making that statement.

THE COURT: I know that you don't and I did not mean to create any personal embarrassment. Let me deal with the matter of August 15th. The question was raised I believe by your office after the July 26th Order was signed in open court concerning state law provisions with respect to the time for a city council proceeding to amend the zoning law. Rather than deal with the question of the extent, if any, to which those time tables were superseded by the federal court order, just to obviate that question, the court indicated that it would suffice if there were a declaration of intent, to adopt the resolution after the requisite time period had elapsed. And that resolution was defeated.

I have to repeat two points. One is there has been no substantive objection made to a single provision of the affordable housing ordinance and the second is as I said in my earlier remarks the City of Yonkers is in contempt because it chooses to be in contempt. It does not find itself inadvertently in this posture. This is not an instance of a miscalculation or a misapprehension or a mistake of law or of fact. The application for a stay is denied. You have until tomorrow before you present your first check.

The elevator leads to the Court of Appeals and the clerk's office. Should you wish to make an application to that body, the Court of Appeals is now being alerted that such an application may be made.

It is not in the interests of Yonkers to prolong this. How many more weekends should Yonkers spend similar to the last one? There are instances in which delay or the opportunity for cool dispassionate reasoning will alter the circumstances. This is not such an instance. The application is denied.

MR. SCULNICK: Your Honor, may I briefly respond to the court's statements that there is no substantive dispute as to the zoning ordinance?

THE COURT: Yes.

MR. SCULNICK: At our prior court hearing, I made the city's position clear that we had opposed the entry of the

long-term plan order and presented various specific objections to the court and, of course, we stand by those objections. Otherwise the statement is accurate.

THE COURT: By using the phrase substantive I meant to incorporate that by reference. We will take a brief recess. After which, we will deal with the matter of the individual city councilmen. May I have the names of the four city councilmen who are subject to these contempt proceedings?

MR. SCULNICK: Vice-mayor Henry Spallone, Minority Leader Longo, Edward Fagan, and Peter Chema.

THE COURT: We will take a five-minute recess.

MR. SCULNICK: Are the councilmen who voted in favor of the ordinance excused from further proceedings? It was our reading of the July 26th order that all council members were required to attend today's session. Are they excused from further proceedings?

THE COURT: I would think that the magnitude of these proceedings is such --

MR. SCULNICK: They are welcome to attend, but I want to clarify whether or not they are required to attend.

THE COURT: I won't require them to attend. I would urge that they do so. I can't think of anything more important to the City of Yonkers. If they can personally do so, I think they should. If at some moment, if some matter may arise such as arose a few moments ago in which it might become appropriate to confer with the members of the city council, it would be helpful to have them present. Perhaps a quorum would be needed.

(Recess)

THE COURT: Mr. Spallone, is he in the courtroom?

(Pause)

THE COURT: Do you have an attorney?

MR. SPALLONE: No, I do not.

THE COURT: Do you wish to have an attorney?

MR. SPALLONE: I would like to have time to get one, but I am prepared to make a statement if I may.

THE COURT: How much time do you need to get an attorney?

MR. SPALLONE: I think I would need at least 24 hours.

THE COURT: Well, Mr. Spallone, you know you have been on notice for quite some time of the pendency of this.

MR. SPALLONE: I am still willing to make a statement. That would be up to you.

THE COURT: Mr. Spallone, I think that --

MR. SPALLONE: Your Honor, I know the consequences and I recognize the position that I am in. And I have been --

THE COURT: I will adjourn the matter of your contempt until 10 a.m. tomorrow with the understanding and condition that your fines will be, if imposed, will be retroactive to today. Thank you. You may be seated.

Mr. Longo, you are here with counsel I believe.

MR. LONGO: Yes.

THE COURT: Who represents you?

MR. LONGO: Mr. Sykes.

THE COURT: Please step forward.
You represent whom?

MR. SYKES: Councilman Longo and Councilman Fagan as well.

THE COURT: Longo and Fagan. I will hear you with respect to the question why they should not be held in contempt of this court's order of July 26th.

MR. SYKES: First I would point out to the court that I was retained in this matter early this morning; Consequently I would like to have a reasonable adjournment in order to adequately prepare myself and familiarize myself with this case.

THE COURT: You see there is or there has to be a realization that we are dealing with an emergency situation here. Now, this order was July 26th. Your clients had ample notice that this moment would come and what the issues would be.

One of the things that we are fighting -- and I use that term advisedly -- that the court is fighting are the efforts that are made to achieve delay. I will hear you. We will rule on the matter this morning. If thereafter you should believe that there is some legal argument or theory or circumstance which you wish to assert on behalf of your clients which was not available to you this morning, you may make another application and I will hear it.

MR. SYKES: That is the purpose of this application. I don't think there was any certainty as to which the council would vote particularly with respect to my client Mr. Fagan as to which the vote was taken last night. I was not aware of the contents of the order.

THE COURT: I am not faulting you, sir, if you were retained this morning. I am saying that your clients had full opportunity to know this and indeed I believe Mr. Pickelle made it a part of the public record that his office would not represent the individual city councilmen. Do you wish to be heard on the merits on the order to show cause?

MR. SYKES: Yes, I do. I would reiterate the need to have a reasonable adjournment so that I could adequately represent my clients in this matter.

THE COURT: I repeat that I will proceed this morning because we are dealing with exigent circumstances and we will reserve to you the right to make any subsequent application to rescind or modify this court's order. You may proceed.

MR. SYKES: If the court please, I believe the court found in its previous finding that there is no dichotomy between the City of Yonkers and the city council. That could not help one to conclude that finding made by the court with respect to the City of Yonkers could be equally applicable to councilmen Longo and Fagan. However, I believe that the councilmen did not act in bad faith and there was no intentional disregard of the court's order; therefore, they should not be found in contempt.

THE COURT: When you say they did not act in bad faith, they acted with an intent, did they not, to be in contempt of this court's order? They were on knowledge that that was the consequence of what they did. And good faith or bad faith is really not the issue. The issue is: Did they consciously, deliberately choose to be in contempt of this court's order?

MR. SYKES: Your Honor, there was substantive basis with respect to the action taken by Councilmen Longo and Fagan inasmuch as the affordable housing ordinance provided more amendments of the zoning ordinances which clearly were defective procedurally and that they denied the planning board's input and also denied the opportunity for a public hearing. And on that basis, the councilmen acted in the manner they did.

THE COURT: Are you representing to the court that the reason why Councilmen Longo and Fagan among other things voted against the resolution of intent was because of this procedural defect and that but for this alleged procedural defect, they would have voted in favor of the ordinance? Are you making that representation to the court?

MR. SYKES: Would the court instruct me with respect to the resolution of the intent, passage of which if I understand it clearly, would have made the affordable housing ordinance a fait accompli? If that is the case and there is a procedural defect with respect to the affordable housing ordinance, a fortiori, I believe the councilmen are not acting in bad faith if they believe there was a procedural defect with respect to the affordable housing ordinance.

THE COURT: And the question is: Is that the reason? Do they now want it to be a matter of public record that but for the so-called procedural defect they would vote for the housing ordinance? Is that what they are saying?

MR. SYKES: Your Honor, I am saying that was a concern they had among others. I think there were several substantive objections that they had to the affordable housing ordinance as well. But in terms of their potential --

THE COURT: What are they? And did they move to amend it, or did they put forth any suggested changes or modifications?

MR. SYKES: I am speaking on information and belief. I believe these issues were addressed by Mr. Longo and Mr. Fagan. I am sure the Court is aware of it.

THE COURT: The court is not aware of a single substantive objection as the term has been defined in the colloquy with Mr. Sculnick to the affordable housing.

MR. SYKES: The primary concern is the procedural defect we perceive with respect to the zoning amendment. On that basis my clients acted the way they did. I don't believe the court could find that they were contemptuous in their actions.

THE COURT: Prior to August lst, the city council of Yonkers adopted a moratorium with respect to all housing and adopted a resolution to rescind the seminary condemnation proceedings, both of which resolutions I am told counsel for the city council, counsel for the city, advised were unlawful, contrary to the orders of this court and advised that they would take no steps to implement them.

There were no so-called procedural defects with respect to those resolutions, were there?

MR. SYKES: I am not familiar with that, your Honor.

THE COURT: Is there anything else you want to tell me?

MR. SYKES: I just reiterate my request for a reasonable adjournment, your Honor.

THE COURT: That you, Mr. Sykes. Mr. Heffernan

MR. HEFFERNAN: Your Honor, on the issue of counsel, it was clear last week as represented to me by Michael Sculnick that the city council persons had been amply informed that the city representatives, namely Mr. Sculnick and Mr. Pickelle, were not going to represent him at this hearing.

They had more than ample notice since frankly this has been going on for two or three weeks that we have been discussing the order and content and what needed to be done for a long time. They knew exactly what needed to be done. They had to pass a resolution last night and they didn't do it.

Quite frankly bad faith, good faith doesn't make much difference. The issue here is: Are they in contempt of the court's order? They are plain and simple. They didn't do it. I don't know if it can be more clear. They are covered under Rule 65 of the Federal Rules. As city council members they are bound by this court's order. In our view there is no question here that they are in contempt.

THE COURT: Mr. Sussman.

MR. SUSSMAN: I believe that the motivation for the actions of the council members who are not being discussed was best made clear by their own words frankly rather than having some other representation of what is being said as to their motives.

This morning in the Herald Statesman, Mr. Longo did explain publicly his vote and he said, "It is a typical case of the hypocrisy of the rich and elitist looking down on those who must work for everything they have."

He is quoted as being attributed to him the fact that "The Judge's order attacked the quality of life in Yonkers." Mr. Longo made other public statement comparing this court to a dictator. We won't go into all of those. I know the court has seen them.

On the front page of the New York Times Mr. Fagan was asked to explain his vote and I saw him on television last night saying much the same thing. He said his vote "was an act of defiance. The people clearly wanted me to say no to the judge."

Now, with all due respect to Mr. Sykes, I don't really believe for one moment that there is any procedure issue or any other issue here. None was raised at the meeting last night. One of the reasons we sought entry to the meeting is so we could hear the debate and know the position, what was said in the situation.

I believe the court should require the city to produce a type of the meeting so it can be part of the record so no claim can be advanced without a record that certain things were said and meant and other matters.

THE COURT: Is there a tape which is in the possession of the control of the city?

MR. SCULNICK: No, your Honor. An outside entity called Cable Vision prepares and produces the tape. The city does not have it.

MR. SUSSMAN: We are at a very great disadvantage. We can't go to the meeting and can't hear the meeting.

THE COURT: Can't go the meeting. Will you explain it?

MR. SUSSMAN: I think it is important because it -- this kind of situation is precisely the difficulty.

MR. SCULNICK: I want to correct my prior statement. I have been advised there is a tape recording of the city council meeting last night that the city has that the city clerk maintains. I was thinking videotape.

THE COURT: I will deem that to be Court's Exhibit A of today and direct that a copy of it be furnished to the court by the close today, at 4:30, and kept as a court document.

MR. SUSSMAN: Briefly Mr. Wallace, the branch president called the city mayor's office yesterday in the afternoon and informed him it was the desire of Mr. Wallace and several other branch members to attend the meeting and would like that arrangements could be made so we could attend the meeting. The court is well aware of the atmosphere and the problems with the meeting.

Mr. Wallace called me and indicated that the mayor felt that I shouldn't come to the meeting, etc., and I indicated that I felt given that we were going to be here on contempt, I didn't know if these people were going to take the stand. It was important that I attend the meeting and hear what occurred.

We were directed to report to a certain door between 7 and 7:30 and told we would then be escorted into the meeting. Mr. Wallace, myself, and an associate of my law firm went to that door about 7:25. We were placed literally in physical jeopardy, in significant physical jeopardy.

What occurred was that we waited by this door. A crowd amassed of about 125 or 150 people. Several police cars between us and this jeering crowd. We waited for literally 25 minutes before anyone even came although we were telling the police that we had this arrangement and we assumed they were aware of it. Finally Mr. Sculnick came down and indicated there was no room for us at the meeting. And we waited --

THE COURT: Mr. Sculnick personally advised you?

MR. SUSSMAN: Yes.

THE COURT: That you could not be admitted to the meeting because there was no room?

MR. SUSSMAN: For us. The TV cameras were going and I said, "I wish this were not a matter of public record." I found it embarrassing for him. It was so ridiculous. I indicated to him having conferred with Mr. Wallace that we had been advised to report to that door at a certain time and that we had been there then for about 20 or 25 minutes, we were subject to all sorts of verbal attacks.

THE COURT: You were not --

MR. SUSSMAN: He came back again and told me again after further conference the city felt that we couldn't come to the meeting. There was no room. Now, the point --

THE COURT: You will have the tape by 4:30 and anybody who wishes will make arrangements. Any counsel in the case may have access to the tape.

MR. SUSSMAN: I think the point is that the reasons these gentlemen voted the way they did is clear from the public statements. They have no privilege with respect to the statement. They should be held in contempt and fined $500 a day. I disagree and I want to make it part of the record with any adjournment for Mr. Spallone who has been saying for a number of months he wants to defy the judgment. I don't see any basis for any adjournment.

THE COURT: Mr. Longo, Mr. Fagan, would you step forward, please?

Mr. Longo, you have heard what has been said this morning? Is there anything you wish to say to the court before I make a determination with respect to contempt?

MR. LONGO: Yes, your Honor. I think this is in response to some of the comment made by the counsel, and that is that certainly the citizens of Yonkers ought to be afforded the opportunity of a public hearing. For me to have

voted in favor of that ordinance before availing myself of the opportunity of the experts that are employed by the city and by the public would have been wrong. It disenfranchises that public.

THE COURT: And that the reason for the vote --

MR. LONGO: And that is the reason for voting against the resolution. And it would seem in voting for the resolution it would preclude that input, and I was not favorably disposed to vote in favor of that. There was a public hearing for that ordinance. It was set with no objection by any of the council members. And in my remarks last evening I alluded to the fact that the public was being disenfranchised.

THE COURT: You are representing to the Court that was the reason for your vote?

MR. LONGO: Yes.

THE COURT: Mr. Fagan.

MR. FAGAN: The resolution that was put before us yesterday would have in fact cut out all meaningful public input. And after the resolution passed, it would preclude input and any subsequent changes to what may happen to that resolution. That was the reason for my vote.

THE COURT: That was the reason for your vote? Are there any other applications on behalf of Councilmen Longo and Fagan other than those that have been stated? Are there any other requests of any nature whatsoever?

MR. SYKES: Not at this time.

THE COURT: The court finds that Councilman Longo and Councilman Fagan are in contempt of this court's order of July 26th. The court rejects as a frivolous pretext the claim that a procedural defect under state law is the explanation for their vote.

How much hypocrisy must be occasioned by this litigation? One cannot say one thing to the world at large and

make another representation to the court. The court finds there has been ample notice and that the commission of the contempt is beyond dispute. Accordingly, the court finds you, Councilman Longo and you, Councilman Fagan, in contempt and imposes upon you personally a fine of $500 per day every day until such time as you shall have purged yourself from contempt as set forth in the terms of the July 26th order.

The fine shall be payable by a check drawn to the clerk, delivered to the clerk no later than 4:30 on each day that the clerk's office is open to the amount of the find incurred for the previous day. The provisions pursuant to which you may purge yourself of the contempt are set forth in the order.

You are further personally notified by the court pursuant to the provisions of paragraph 5 of the order that if the necessary legislation is not enacted by on or before August 10, 1988, and I include in that just again to obviate this question of state law and the dates contained in the state law provisions, a resolution of the intent of the city council will be adequate for these purposes. But if it not enacted, and if such a resolution is not enacted on or about August 10th, then you are subject to commitment on August 11th to the custody of the United States Marshals until such time as you have purged yourself of contempt.

Do you understand?

MR. LONGO: Yes.

MR. FAGAN: Yes.

MR. LONGO: Yes.

MR. FAGAN: Yes, your Honor.

MR. SYKES: May I be heard? I would make an application for a stay of the court's finding of contempt and imposition of fines.

THE COURT: Fine is not payable until 4:30 tomorrow. I say to you as I said to Mr. Sculnick, you are certainly free to take the elevator, go up to the Court of Appeals

and make your application to that tribunal. The staff of the Court of Appeals has been alerted to the fact such an emergency application will be made; otherwise this court denies the stay.

I may say that, Mr. Sculnick and Mr. Sykes, if the Court of Appeals requires a written order from you denying the stay, prepare such an order and I will sign it forthwith.

MR. HEFFERNAN: Your Honor, for the record, I would like to note the objection of the United States to any granting of the stay.

MR. SUSSMAN: NAACP shares that view.

THE COURT: There remains Mr. Chema.

MR. CHEMA: I am represented by my attorney. May I come forward?

THE COURT: Yes.

MR. HARMON: I am James Harmon. Good morning, your Honor. My name is James Harmon. I am here, your Honor, for one narrow purpose. I represent one man and as I understand it having also been retained at 8 a.m. this morning, the sole issue is whether there was a willful violation of a lawful order of this court and whether any such violation was committed without justification.

To some degree I feel like I am the man who landed from Mars here this morning after a long history of litigation in this case, being asked to come in and present to your Honor the position of this one man who does not seek notoriety, who is an ordinary person, who fulfills his position as a member of the city council, a part-time position, who otherwise supports his wife and family and who really, your Honor sees no future in martyrdom.

So I come before your Honor asking you to understand that it was not clear until this vote last night that Peter Chema was going to need an attorney this morning.

THE COURT: I can't accept that. I mean I accept that it was not clear to you. I understand you have just been retained this morning. I didn't mean to be facetious, but the course on which Yonkers has been headed and has been headed for months has been a very clear course.

This is not the first occasion on which this court has indicated an intent to use its contempt powers should the need arise. You know the nature of the fines, nor should it have been any surprise to any responsible public official that he would have a personal responsibility for his acts. It was very simple.

The issues before the city council yesterday were clear issues. There was a very explicit court order and the alternatives were comply with the court order or not comply and be in contempt. The consequences of being in contempt were spelled out chapter and verse in the court's order of July 26th. So when you say it wasn't clear until this morning, I have to say it was not clear to anyone who is not familiar with these proceedings. But it was crystal clear to anyone who was familiar with these proceedings.

MR. HARMON: What I mean by my statement, your Honor, is that in theory the order was violated only after a vote was taken. And it was not clear until after the vote was taken that under any set of circumstances there, in fact, your Honor's court order would have been violated.

THE COURT: As I stated to Mr. Sykes, although this is the precipitating event, the straw that breaks the camel's back so to speak, there is a history here. The Department of Justice was seeking contempt a few weeks ago when the city council adopted two resolutions which it knew, which it had to know were unlawful and in violation of orders of this court.

I don't think they will be heard to say that they are so obtuse as not to have fully appreciated the consequences of their actions.

MR. HARMON: Yes, your Honor. I think although I must say that I am not deeply familiar with the facts of this case, your Honor, I do have some familiarity with the law of

contempt. And I would suggest that it is important here, your Honor, that this clash of constitutional obligation, not in any way works to deprive the rights of this individual, Peter Chema.

I would suggest to your Honor --and I hope your Honor would agree --that it is as important as to how your Honor would reach a conclusion as to Peter Chema as well as to your ultimate decision.

THE COURT: I think it is an extraordinary circumstance. I know of no parallel for a court to say to an elected official, "You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote." I find that extraordinary.

I find it so extraordinary that at great cost in terms of time and in terms of money and energy and implementation of court's orders, I have sought alternatives to that. But they have been unsuccessful. So it came down then to a very simple question last night. And that is regardless of his personal views or personal sentiments, whether he was going to obey a federal court order or defy it. And that is the choice he made as crystal clear as it could be.

MR. HARMON: We would suggest to your Honor that summary disposition of this contempt, alleged contempt, is not appropriate in this case.

THE COURT: Now, you have used a procedural term! You are talking about summary disposition. Is there any hearing or other procedure that you seek?

MR. HARMON: Yes, your Honor.

THE COURT: What is that? Tell me that.

MR. HARMON: First of all, we believe and I would cite for the general proposition Ketchen 706 Fed 2d 1266. The constitution provides certain procedural safeguards for the person alleged to be in civil contempt. Among those are right to counsel, counsel adequately prepared to protect his interests,

the clear issue of intent and willfulness on his part which can in fact be resolved by his credibility on the witness stand.

In addition, he has a right, we submit, to present witnesses on his behalf.

THE COURT: Do you wish to hold an evidentiary hearing? Fine. We will hold it forthwith. Does Mr. Chema wish to take the stand?

MR. HARMON: What I say is my retention by Mr. Chema was at 8 a.m. We are not prepared to make the kinds of judgment that we think that the constitution permits Mr. Chema to have access to before proceeding before this court.

We respectfully request an adjournment to address and think about it.

THE COURT: How long do you wish?

MR. HARMON: Two weeks.

THE COURT: Denied. You don't wait for two weeks while the house is burning. You don't wait for two weeks when you are told that the bond rating company is going to act within the next day or so or perhaps it has already acted in a fashion which is going to have extremely adverse consequences to Yonkers.

MR. HARMON: Your Honor, if the court is not inclined to grant a two-week adjournment, we leave it to your Honor to suggest a reasonable adjournment given the entire history of this case.

THE COURT: Tell me the purpose. Now, Mr. Spallone did not have counsel. I think that very basic right is to have counsel and his request was for an adjournment until tomorrow, and I granted that.

Now, you have made two requests. And you made a request for an evidentiary hearing and I grant that request.

MR. HARMON: I did not make that request. I requested the opportunity to evaluate as a lawyer should whether or not an evidentiary hearing is required in this case. I certainly can't do that without knowing the facts of the case. So we would like the opportunity to evaluate his position, your Honor.

THE COURT: But Mr. Chema elected in the face of the July 26th order, in the face of the explicit advice he received from the corporation counsel of the City of Yonkers that he would not be representing him today, to wait until this morning.

Now, I will make the same ruling as I made with respect to Mr. Syke's application. I am going to proceed this morning in whatever fashion you wish. If you wish an evidentiary hearing, the witness stand is there. Mr. Chema is free to take it and without prejudice to any application you wish to make to reopen the matter based on whatever it is that your further discussions with Mr. Chema or your research indicates.

I think the elements of contempt are very clear. There is no question that there has been notice. There is no question but that there has been a specific order of the court, and there is no question that there has been a failure to comply with that order. There is the opportunity now to be heard. The time and place of this hearing was scheduled on the 26th of July.

MR. HARMON: I appreciate the opportunity that the court has given us this morning, your Honor, but I must say also in good conscience that we would not be able to adequately represent Mr. Chema's interests given the short notice to his counsel.

THE COURT: I just want to say again that the shortness of that notice is the result of Mr. Chema's decision not to seek counsel until this morning. It is not a failure on the part of the court or of the parties to give Mr. Chema ample notice of what the issues would be this morning.

MR. HARMON: If the court, therefore, is inclined to go ahead, fine. It sounds to me the court is inclined to go ahead.

THE COURT: You got that message.

MR. HARMON: Even if you just landed from Mars at 8 a.m. this morning, it doesn't take long to get that message.

THE COURT: Because the people of Yonkers are entitled to have these matters end, not to have this drain, this emotional, fiscal drain. You have got to create a community in which people can live together. And this is creating a community in which you have a different circumstance.

The complaint was filed in 1980. It is always the case that when counsel comes in late in the case and the reaction is, "What is the great rush?" The great rush. It may appear to be a great rush to somebody who is retained at 8 a.m. on August 2nd, but to the people whose constitutional rights have been violated and who have been waiting for years for a vindication of those rights for redress and remedy, there hasn't been a great rush in this case.

MR. HARMON: I understand that I am bearing the burden here of a lengthy history of this case, your Honor. We would also again argue that the contempt such as it may have been did not occur until sometime last night.

THE COURT: I want to make it clear again because I don't want in any other procedural context there to be any ambiguity about that. To the extent that you request an evidentiary hearing, that request is granted. What is denied is the request for a two-week adjournment.

MR. HARMON: To the extent you are inclined to go ahead, when the court does deal in civil contempt and sanctions under contempt, you are dealing with human dynamics and the effect of the coercive power of the court and what response that course of power may engender.

You have talked here I think very directly and eloquently here this morning about the other remedies open,

options to other public officials to take action which apparently they have not done as of this point in time. You have also gone ahead and imposed a serious civil contempt sanction on the City of Yonkers.

It seems to me that although that civil contempt sanction is directed at the city itself, there is nothing that says that this contempt sanction can't have a really personal result on public officials themselves. So that --

THE COURT: Personal result?

MR. HARMON: Yes.

THE COURT: Personal responsibility. It is a human being that casts a vote. It is a human being who has taken an oath to protect and defend the constitution. Of course, it is personal. We deal with human beings fortunately.

MR. HARMON: What I would suggest here, your Honor, is that this court allow the impact of the civil contempt fine imposed upon the City of Yonkers to have its impact and to run its course --

THE COURT: You see the little pas de deux? The city is saying, "It is not our responsibility. It is the city council." And the city councilmen are saying, "Let the impact on the city run its course", and in the meantime, the housing isn't being built.

MR. HARMON: We suggest what is the purpose of civil contempt? To have the coercive effect of the court's sanction and order produce the result that the court wants.

THE COURT: Mr. Chema as you know has the opportunity to purge himself of contempt as set forth very explicitly in the order. So that it is not the circumstance that he has no alternative. He has a very clear alternative. Indeed the purpose of civil contempt is not there to be the alternative or compliance.

MR. HARMON: We would ask that the court withhold any action with regard to judging Mr. Chema in contempt or

imposing sanctions under a contempt order until the imposition or the time against the City of Yonkers has had some opportunity to be tested. Other than that, your Honor, other than what I have already stated, we simply are not in a position to make a judgment as to whether or not Mr. Chema's interests both factually and legally are best served here by an evidentiary hearing.

We certainly know that it is not possible for us to address the legal issues that are related here in such a short period of time. That concludes my statements.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Your Honor, with regard to Mr. Chema, I don't think there is any difference between him and his vote last night and any of the other city council persons who voted against the resolution. From our perspective, they are clearly in contempt of an unambiguous court order. Your Honor, I didn't land from Mars this morning. I have been on this case for going on a year now --

THE COURT: You are a novice.

MR. HEFFERNAN: And I recognize that compared to the eight or more years of experience that some of the people in this courtroom have had in this case, that is not much. It has been long enough to learn a few things. It has been long enough to ask the question before practically every hearing we have here, what is going to come up that is going to delay the thing further?

I hadn't thought of this one, your Honor. Now they come in this morning, the city council people, and make this claim that they haven't had a chance to consult with counsel. It is a ridiculous claim. They have been well aware of what is going on here. They knew they may need counsel as little as a week ago and probably a lot longer than that. So from our point of view, your Honor, the claim is simply pretext.

Mr. Harmon may have landed from Mars this morning at 8 o'clock, but it didn't take him long to come up with an argument that we heard on many occasions. Put the blame on

the other guys. We shouldn't be accountable. We heard it a lot in the last several weeks.

The claim is basically let the city take the blame. Let the city pay the price for it. But why should city council members pay a price for it? After all they are only human? They are human. They are answerable to this court. They are answerable to the city. They are bound by this court's order.

There should be contempt sanctions. There is no doubt there is contempt. It should be against Mr. Chema just as it should lie against any city councilperson who voted against the resolution last night.

THE COURT: Mr. Sussman.

MR. SUSSMAN: Judge, I have two sets of comments. First of all, I just think for the purpose of the record it should be made clear that Mr. Chema was one of the two council members -- and there are only two council members who voted on January 27, 1988, against the entry of the consent decree, against the long-term plan. And since that day, Mr. Chema to my knowledge, and I think the record would bear this out, has voted against every measure or voted in favor of many measures which have been intended to frustrate this court.

He has been quoted publicly on numerous occasions including in the last two weeks as saying that he would vote against this resolution at the point then in time that it was in fact an ordinance and not simply a resolution.

THE COURT: You are making this argument with respect to adequacy of time to obtain counsel?

MR. SUSSMAN: That is correct. And put it in some context of his frame of mind which can be derived from those votes. He is not a late convert to opposition here nor a late convert to knowledge of his acts which are contemptuous of the court.

That to one side, I think we should have more clarity frankly on the record as to precisely what the procedural status

of Mr. Chema and perhaps the others, Mr. Spallone and gentlemen represented by Mr. Sykes, what their status should be.

It seems to me that the way it ought to be left is very simple. The court having given those who are represented by counsel an opportunity to be heard should be explicit and state that should they demand an evidentiary hearing within a time period that is set after consultation, the court is prepared upon hearing the evidence that is presented to revisit the question and contrary to the procedure which was made clear, in fact refund any fines paid if in fact these people can show that they should not have been held in contempt. So that there is no question that procedurally their rights are protected.

They are not ready for evidentiary hearings today although they ought to be. I don't believe any such hearings will be held. I don't believe they will shed light on the contempt, maybe they would. The court should not be open to any procedural ambiguity. We know these things are going to be taken up and questions as to what the court was prepared to do.

In a prior case, frankly, where no evidentiary hearing was requested, we got to the Court of Appeals and there was a question why there was no evidentiary hearing. That put me in a position of opposing the position and supporting the movant for a hearing in order to protect ourselves.

If these people want a hearing I believe by the end of this week, it should be set. They should come in and the court should be on record as stating that their contempt if it is shown not to have been actual, any fines paid will be refunded.

THE COURT: Let me first of all say I am going to ask that the Department of Justice and NAACP prepare this morning -- it can be in handwriting -- a written order so that there will be a written, signed order for appellate purposes.

I will direct that the checks given by the individual councilmen be held by the clerk of the court for ten days, that is, until August 12th so that should there be reasons between now and August 12th to set aside the contempt, that power

will exist. Let me make clear my intent with respect to that. If after an evidentiary hearing, I conclude that the city councilmen in fact were never in contempt, then the checks will be returned; but if I conclude that he was in contempt this morning, but was not in contempt or took remedial action, purged himself subsequently, then the checks will indeed be deposited.

MR. SUSSMAN: I think that is entirely defensible. I think counsel should be advised it is within that period that they have to that they must come in, rather than coming in on the llth day and raising a question that it wasn't clear.

THE COURT: I would think we should set a more specific timetable. Mr. Spallone has until 10 a.m. tomorrow, Mr. Sykes. And Mr. Harmon, the only request that you made was for two weeks and that is unacceptable. Do you want to pinpoint a specific date?

MR. HARMON: Yes, I think considering the lengthy history to this case, I think one week would give us our best opportunity under the circumstances.

MR. SYKES: If I understand the court correctly are we to be afforded an evidentiary hearing?

THE COURT: You haven't requested an evidentiary hearing. Are you now requesting an evidentiary hearing?

MR. SYKES: I am trying to understand what the court's statement indicated or is granting.

THE COURT: The law of contempt gives to your clients various procedural rights, notice, opportunity to be heard and the notice for a hearing. If you are making a request for a hearing, then we will set a timetable for it. If you want an opportunity to consider whether you are making a request for a hearing, we will give you that. Suppose we say 4:30 this Friday this court is to be advised in writing by counsel for Chema, Longo, and Fagan whether they wish an evidentiary hearing.

If there is to be an evidentiary hearing, we will hold it on August 8th at 10 a.m. That is the following Monday. As I have already indicated, the clerk's office will hold the checks until August 12th.

Let's understand so that we don't expend needless time and energy what the nature of that hearing will be. I heard references to calling witnesses and so on. And if there are witnesses to the state of mind of Mr. Chema, then perhaps they can testify. I am not quite sure how that happens.

We are not retrying United States against Yonkers. We spent over 80 trial days doing that, nor are we trying the pros and cons of various means of creating housing. What we would be hearing at the evidentiary hearing relates to whether there is contempt, that is, whether in fact the councilmen voted in the way this court has been told they voted. That is the first question. The second question is whether that constitutes a violation of the July 26th order of the court and the third would be any mitigating circumstance.

Let's define mitigating circumstance. Political pressure, constituent pressure, fear of unpopularity, fear of physical threats or safety, none of those are mitigating circumstances. I am hard put and I will leave it to the ingenuity of counsel to think of what a mitigating circumstance might be, but we are available and we will hold such a hearing if requested in writing prior to 4:30 this Friday. Please respond in any event. That is, if there is no request for a hearing, let me have that in writing. If there is a request for a hearing, let me have that in writing.

MR. SUSSMAN: I agree with Mr. Heffernan and I think that the time for Mr. Chema to be held in contempt pending any such request is now. I don't see any possible defense. I think the history of his actions has been contemptuous and it didn't just start last night.

THE COURT: Mr. Chema, would you come forward please?

MR. HARMON: May I make this representation to the court, if we make a judgment in advance of Friday at 4:30 there

is no need from our point of view for an evidentiary hearing. I will let your Honor's chambers know as well as counsel.

THE COURT: That would be helpful.

MR. HARMON: And if we decide to proceed on a legal analysis, we will advise your chambers and counsel for the government and the NAACP.

THE COURT: Thank you. I am told that for portions of these proceedings one city council member was not present in the courtroom. I will assume that his colleagues will apprise him of all that has transpired in his absence.

Mr. Chema, you have heard what has happened this morning. The fact is, is it not, that you received notice of these proceedings and of the court's order and that you voted yesterday in the manner which has been represented?

MR. CHEMA: Yes.

THE COURT: Is there anything you wish to say?

MR. CHEMA: No, your Honor.

THE COURT: The court finds that you are in contempt. The court finds that there was adequate notice, that there was an opportunity to be heard, and that there is no question but that there has been contempt.

As I have indicated I will direct the clerk to hold until August 12th the checks which you are to furnish on a daily basis beginning tomorrow and I will afford to you and your counsel if you request an evidentiary hearing.

I act now rather than wait until some later date because I perceive this to be a situation which requires immediate action and I cannot tolerate anything with smacks of dilatory proceedings.

Is Mr. Spallone in the courtroom? Mr. Marshal, would you see if Mr. Spallone is in the hallway?

(Pause)

THE COURT: I don't think I will await Mr. Spallone's pleasure, but I would appreciate it if counsel would advise him of the scheduling that has been made with respect to the other city council members. I ask that he advise chambers, that his counsel advise chambers whether he wishes to proceed tomorrow morning as originally scheduled or to proceed next Monday.

Is there anything else? I would appreciate the preparation of a formal order embodying these rulings. Long hand will be sufficient.

MR. SCULNICK: Your Honor, I would like to request a meeting with the court in the jury room with all counsel at the conclusion of this. I have an application to make and then we can go back on the record.

THE COURT: Yes. We will adjourn and I will see counsel in the jury room.

(Recess)

THE CLERK: Ladies and gentlemen, that concludes the proceedings for today.

Order Adjudging Peter Chema, Nicholas Longo and Edward Fagan in Contempt (Sand, J., August 2, 1988)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *et. al.*,

v.

Civil Action No.
80 Civ. 6761 (LBS)

YONKERS BOARD OF EDUCATION, *et. al.*,

ORDER

On July 26, 1988, this Court entered an order requiring the City of Yonkers to pass on or before August 1, 1988 the legislative package relating to the long-term plan as described in Section 17 of the first remedial consent decree in equity dated January 28, 1988 and the long-term plan order dated June 13, 1988 ("Affordable Housing Ordinance"). Following entry of that order, counsel for the City raised a number of questions as to the applicability of state law provisions relating to amendments to the City's zoning ordinance. Rather than deal with any question of federal preemption, this court notified counsel for the City and the plaintiffs by letter dated July 28, 1988 that compliance with its July 26th order could be met by adoption by the City Council of a resolution committing the City to enact the affordable housing ordinance within the time prescribed by notice pursuant to state law.

The July 26th order further provided that, upon the City's failure to enact the legislative package as required, the City and its individual City Council Members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1, 1988, the City Council, by a vote of 4-3, refused to adopt the required resolution. Members of the City Council voting against the resolution were identified as Vice-Mayor Henry Spallone, majority leader Nicholas Longo, Edward Fagan and Peter Chema.

At the hearing, the individual Council Members were called to appear and show cause why they should not be adjudged in civil contempt of the July 26th order.

Council Member Spallone advised that he had not yet obtained counsel, but desired to do so. Although this court believes that Mr. Spallone had adequate notice to retain counsel as of August 2nd, this court hereby adjourns the hearing on his possible contempt until 10:00 A.M., August 3, 1988, to assure his representation by counsel.

Council Members Longo, Chema and Fagan appeared with counsel. Each of those Council Members was given an opportunity to show cause why he should not be held in civil contempt of this Court's July 26, 1988 order. Having considered the arguments of all parties and the Council Members, this court finds as to Messrs. Longo, Chema and Fagan:

1. That each such Council Member received adequate notice as to his duty under the July 26th order;

2. At the hearing on August 2, 1988, each such Council Member had an opportunity to be heard;

3. That each such Council Member had the ability to comply and a full understanding of the consequences of his non-compliance; and

4. That each such Council Member receive adequate notice of the possible need to retain counsel prior to the August 2nd hearing and that any claim on their part of inadequate representation due to a lack of time to consult with counsel must fail. Any such delay in consultation must be attributed to the Council Members themselves and not to this court or the parties.

Accordingly, Messrs. Longo, Chema and Fagan are hereby adjudged to be personally in civil contempt of this court's July 26, 1988 order.

Therefore, it is hereby ORDERED that Messrs. Longo, Chema and Fagan:

1. Shall each be personally fined $500 per day every day until such time that he purges himself of contempt by voting to enact the affordable housing ordinance, or a resolution of intent to

adopt the same, or such time that the City has so acted. Payment of these fines shall proceed as set forth in paragraph 4 of this court's July 26, 1988 order. The first check is due and payable by 4:30 P.M. on August 3, 1988. Any such checks payable pursuant to this paragraph shall be held by the Clerk of the Court until August 12, 1988, preserving the Clerk's power to refund such payments should this court find reasons between now and August 12th to set aside these findings of contempt;

2. Any such Council Member who has not purged himself of civil contempt on or before August 10, 1988 shall be committed on August 11, 1988 to the custody of the United States Marshall until such time as the City enacts the legislation or until such individual Council Member purges himself of contempt. The contempt fines shall continue during any time of imprisonment.

It is further ORDERED that by 4:30 P.M. on August 5, 1988, counsel for Messrs. Spallone, Chema, Longo and Fagan shall advise this court in writing whether they desire a further evidentiary hearing in this matter. If such a hearing is desired, it will be held at 10:00 A.M., August 8, 1988.

It is further ORDERED that the applications of Messrs. Fagan and Longo for a stay of this order are denied.

SO ORDERED:

DATED: August 2, 1988
New York, New York

UNITED STATES DISTRICT JUDGE

Order Adjudging City of Yonkers in Contempt (Sand, J., August 2, 1988)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Interveners,

v.

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 Civ. 6761 (LBS)

ORDER ADJUDICATING CITY OF YONKERS IN CIVIL CONTEMPT

ORDER

SAND, J.

On July 26, 1988, this Court entered an Order requiring the City of Yonkers pass on or before August 1, 1988, the legislative package relating to the long term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988, and the Long-Term Plan dated June 13,

1988 ("Affordable Housing Ordinance"). Following entry of that Order, counsel for the City raised a number of questions as to the applicability of state law requirements relating to amendments to the City zoning ordinance. Rather than deal with any question of federal predemption, this Court notified counsel for the City and the Plaintiffs by letter dated July 28, 1988, that compliance with its July 26th Order could be met by adoption by the City Council of a resolution committing the City to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

The July 26th Order further provided that upon the City's failure to enact the legislative package as required, the City and its individual city council members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th Order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1st, the City Council, by a vote 4-3, refused to adopt the required resolution. Members of the city council voting against the resolution were identified as Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan and Peter Chema. At the hearing, the City was given ample opportunity to show cause why it should not be held in civil contempt of this Court's July 26, 1988 Order. Having considered the arguments of all parties, this Court finds as follows as to the City of Yonkers:

1. The City received adequate notice as to its duty under the July 26th Order;

2. At the hearing on August 2, 1988, the City had adequate opportunity to be heard; and

3. The City had the ability to comply and a full understanding of the consequences of non-compliance.

Accordingly, the City of Yonkers is adjudged in civil contempt of this Court's July 26, 1988 Order. The Court notes that this action is but the latest in a series of contempts of this

Court's prior Orders. However, this contempt is the most immediate and clearly drawn.

In so finding, this Court rejects that City's contention that a dichotomy can be drawn between the City and its council members through which it acts.

Therefore, it is hereby ORDERED that:

1. Until such time that the City has purged itself of contempt by enacting the Affordable Housing Ordinance or a resolution of intent to adopt the same, the City shall be subject to daily fines as set forth in Paragraph 3 of the July 26, 1988 Order. The first check is due and payable by 4:30 p.m. on August 3, 1988.

2. If at some later point, the City purges itself of contempt and then resumes its contumacious conduct, the level of fines to be imposed for such renewed contumacy shall begin at the level at which the fines had previously ceased; and

3. The City may apply in this Court at any time for relief from this Order based upon a showing of changed circumstances warranting such relief.

It is further ORDERED that the City's application for a stay of this Order is DENIED.

SO ORDERED

DATED: August 2, 1988
New York, New York

LEONARD B. SAND
United States District Judge

(Stamped):
Illegible

Order (Sand, J., August 3, 1988)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES, *et al.*,

Plaintiffs,

against

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

On August 2, 1988, this Court entered an order adjudging Peter Chema in civil contempt for the reasons stated therein.

In addition, it is hereby ordered that the application of Peter Chema for a stay of the order of contempt and the imposition of sanctions is hereby denied.

SO ORDERED:

Dated: New York, New York
August 3, 1988

LEONARD B. SAND
United States District Judge
8/4/88

(Stamped):
U. S. District Court
Filed Aug. 4, 1988
S. D. of N. Y.

Minutes of District Court Proceedings (Sand, J., August 4, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA
and
YONKERS BRANCH NAACP, et al.,

Plaintiff Intervenor

against

80 Civ 6761 (LBS)

YONKERS BOARD OF EDUCATION, CITY OF YONKERS, and YONKERS COMMUNITY DEVELOPMENT AGENCY

Defendants

----------X

August 4, 1988
11:30 a.m.

(In open court)

THE COURT: When this matter was last before the court on the order to show cause why city councilmen should not be held in contempt of this court's order of July 26th, Mr. Spallone requested an adjournment so that he might obtain the services of counsel. The matter has been adjourned until today. Mr. Fontana, I take it you are appearing on Mr. Spallone's behalf.

MR. FONTANA: Also Anthony Mercorella from my office.

THE COURT: Gentlemen, let me first state for the record that the court has received and listened to and forwarded to the Court of Appeals the tape of the proceedings before the Yonkers city council on August lst. That was deemed marked as an exhibit in the proceedings on Tuesday so that I have had the benefit and the Court of Appeals will have the benefit of

knowing exactly what it is that was said on August lst, the benefit of hearing the actual words.

Now, on Tuesday when other counsel were present, there was a discussion of the issues which were and were not relevant to this contempt proceeding. I believe during part of this discussion Mr. Spallone was not in the courtroom, and I urged his colleagues to apprise him of the nature of these proceedings.

Let me state the issues and then ask counsel to inform the court which, if any, of the issues are the subject of dispute.

The issues are: One, whether there was notice of the court's order. Mr. Spallone was in fact in the courtroom when the order was signed. So one issue is whether there was notice.

The second issue, of course, is whether Mr. Spallone on August lst did or did not vote no on the resolutions before the city council.

The third issue is whether he did so intentionally, deliberately, and with an awareness that that action was contrary to the order of the court.

The fourth issue is whether he has had an opportunity to appear and be heard.

Certain things are not relevant to these proceedings. This is not a retrial of the liability phase of the United States against Yonkers. I said this on Tuesday and I don't think there was any disagreement with that. The merits or perceived lack of merits in the court order are not relevant either. This is to distinguish this sanction from other possible sanctions. This is classic contempt; that is, a specific order of the court and alleged failure to comply with that.

Who wishes to be heard? Mr. Mercorella, will you please tell me at the outset which if any of the issues that I have delineated are under dispute? Is there any dispute that Mr. Spallone had notice of the order?

MR. MERCORELLA: Your Honor, it is our position that Mr. Spallone did not receive adequate notice pursuant to the rules of civil procedure.

THE COURT: Pursuant to which rules?

MR. MERCORELLA: Pursuant to Rule 42. Might I inquire if this is an evidentiary proceeding which will result in an adjudication of contempt? And if so, is it civil or criminal?

THE COURT: This is a civil proceeding that the government has brought on its application and has sought sanctions for civil contempt and has reserved the right to bring criminal contempt proceedings. This is civil. This is the classic civil contempt. You are fined until you comply. The object of this court is not to punish, but to compel compliance. That is the classic civil contempt.

The question of notice, what aspect of notice do you claim is lacking here?

MR. MERCORELLA: I don't know that we had. At that time a notice was allegedly given orally in court that your Honor stated a time and place of a hearing and that we were allowed a reasonable time for the preparation of the defense, or that we had the essential facts constituting the alleged contempt action given to us.

THE COURT: Tell me what you lacked. Mr. Spallone was here in open court. The court announced that he had received a copy of the government's papers. Mr. Sculnick representing the City of Yonkers specifically put on the record that the order as signed by the court was identical to the order contained in the government's moving papers. The court orally stated in Mr. Spallone's presence the essential provisions of the order.

MR. MERCORELLA: Nevertheless, your Honor, the rule specifically required that you state essential facts constituting the criminal contempt charged and described it as such. I am merely following the dictum of the statute, of the rules.

THE COURT: And I take it that you also are looking at the order and the direction in the order?

MR. SUSSMAN: It is not criminal contempt. I don't understand what is being stated here.

MR. MERCORELLA: Nevertheless the procedures of the civil contempt must follow the rules as provided for in criminal contempt.

THE COURT: Tell me what it is that Mr. Spallone lacked. Are you saying that when Mr. Spallone cast his vote at the city council meeting on August lst, he was not aware of the fact that there was a court order which directed that that resolution be adopted and which subjected individual city councilmen who did not vote in favor of that resolution to contempt proceedings?

MR. MERCORELLA: There is no denial of that.

THE COURT: Tell me what are the issues that I have set forth is a matter of dispute? And then I will answer your question.

MR. MERCORELLA: I am addressing a procedural issue.

THE COURT: Tell me what defect there has been.

MR. MERCORELLA: The court failed to state the essential facts constituting the criminal contempt charge and described it as such in the notice given or not given.

THE COURT: I reject that as a matter of law and there is no need for any evidentiary hearing on that. It is a matter of law pure and simple. No city councilman had more notice than Mr. Spallone because he alone of the members of the city council was present at the time the order was entered.

Next point.

MR. MERCORELLA: However, Mr. Spallone was not present and was systematically and deliberately excluded

from all of the proceedings prior to the entry of the January 28th consent order.

THE COURT: And what is the relevance of that?

MR. MERCORELLA: The relevance would relate to an attempt to explain his vote which your Honor would like to have I presume on August lst.

THE COURT: I have had the benefit of listening to Mr. Spallone explain to the city council the reasons for his vote.

MR. MERCORELLA: You Honor--

THE COURT: But please, the question is not whether Mr. Spallone is of the opinion that the resolution is a good resolution or a bad resolution. The question is not the internal procedures of the city council which led to the consent decree. The question is a very limited question. It is a question whether Mr. Spallone voted no, whether he knew that he had been ordered by the court to adopt the resolution, whether he did so with an awareness that would subject him to the contempt proceedings, whether he had notice and an opportunity to appear. Which of those issues, if any, is the subject in any factual dispute?

MR. MERCORELLA: Your Honor, specifically, your order directing Mr. Spallone to adopt a resolution was worded in a negative fashion. It did not affirmatively or specifically direct him to do anything. What your Honor did was order him not to vote against. And I say that language is so ambiguous that requires an evidentiary hearing as to what exactly is expected.

THE COURT: Let's talk about the evidentiary hearing. What is going to happen at this evidentiary hearing? Mr. Spallone is going to take an oath and he is going to testify that he did not understand that he was under the court order to vote for that resolution? Is that what is going to occur at the evidentiary hearing? If so, let's have it right now. Let Mr. Spallone take the oath and take the stand and state that to the court.

(Pause)

MR. MERCORELLA: Just deferring that for a minute, it is our position that your Honor lacked the power or the authority to direct Mr. Spallone in his legislative capacity to vote in any particular matter. This is not a ministerial act, and our research has disclosed no case or authority for any court to direct a duly elected representative of the people to pass the vote in any particular matter.

THE COURT: You are aware, I assume, that the position taken by the City of Yonkers was that this was in the nature of a purely ministerial act, that, indeed, the court itself could have signed an order adopting the resolution and that was the ground on which the city was resisting the court's order.

MR. MERCORELLA: I am not aware of that. I would concede that the court had the power to use whatever enforcement proceedings it deemed fit to implement its order, but to direct an individual legislator to vote in a certain matter, brings us grave constitutional and moral questions.

THE COURT: That is not an evidentiary matter. That is a pure legal issue.

MR. MERCORELLA: Yes. But contrary to what has been asserted in the meeting, Mr. Spallone is not attempting to become a martyr nor is he attempting to play chicken with his colleagues in the city council.

THE COURT: I take it that Mr. Spallone's position inside this courtroom will be consistent with his position outside this courtroom?

MR. MERCORELLA: I think we can fairly assume that.

THE COURT: The Herald Statesman Newspaper has a photograph of Mr. Spallone, Wednesday August 3, page 10 and it says, "I will be taking on the judge all the way down the

line. I made a commitment to my people and that commitment remains."

We all know that sometimes one is quoted in the press in an inaccurate fashion. So if that is not an accurate quotation, I take it that Mr. Spallone will through you advise me that that is not an accurate quotation of what he has said or what his position was.

(Pause)

MR. MERCORELLA: Simply stated the respondent has told me he stated those words in an effort or attempt to justify his unbridled unfettered right to vote his conscience.

THE COURT: Well, is this Mr. Spallone's position: I was ordered by a federal court to take a certain action. As a matter of my conscience, my view of what my responsibilities were, I could not take that action. I did not take that action. As a matter of conscience, I deliberately violated a federal court order with an awareness that the consequences of that would be that I would be in contempt of the order?

If that is Mr. Spallone's position, that is an entirely consistent position and we will proceed on that basis. Is that his position?

MR. MERCORELLA: Can we hear from Mr. Spallone directly?

THE COURT: Does he wish to testify? If he wishes to testify and he can take the oath and testify.

(Henry Spallone duly sworn)

THE COURT: Mr. Spallone, paraphrasing the statement that your counsel made, is it your position that there was a court order of which you were aware which required you and your fellow councilmen to enact a resolution that for whatever reason you believed that you should not do so with an awareness of the consequence of that action was that you would be in violation of the order of this court? Is that your position?

MR. SPALLONE: I would hope that the judge would make clear the question of what he really meant when he said reasons. What reasons were you talking about, sir? I just want a clarification of your questions.

THE COURT: Whatever reasons you had, whatever reasons you thought were good and sufficient to yourself because you believed the ordinance was improper or whatever. For whatever reason you believed that this is an action that you should not take and, therefore, you did not take. Is that your position?

MR. SPALLONE: I believe and I have to state for the court that I could not in good conscience follow that order predicate on directing me to vote for an issue that has some serious problems with it. And I have a responsibility -- may I finish?

THE COURT: I will give you an opportunity. I will give you an opportunity to say whatever you wish to say within some reasonable bounds or relevance and propriety. Now, I think we really have very carefully focused on what is relevant and what is not relevant for purposes of this contempt.

MR. MERCORELLA: May I ask one question?

THE COURT: Yes.

MR. MERCORELLA: Mr. Spallone, do you have any legal reservations of the propriety of Judge Sand's vote as it affected your conscience?

MR. SPALLONE: Most certainly.

THE COURT: Do you want to state what those legal reservations were?

MR. MERCORELLA. I think I could address that, your Honor.

THE COURT: It seems to me with respect to an evidentiary hearing, I had asked that you make an offer of

proof. And the only matter which I am aware of which hasn't been resolved by this colloquy although it is gone into at some length in Mr. Spallone's statement to the city council which is a part of the record in this case are the reasons for his noncompliance.

MR. MERCORELLA: If your Honor is suggesting that my intervention to offer a legal explanation doesn't raise a factual issue requiring an evidentiary hearing, I would admit that.

THE COURT: Tell me what factual matter you believe is in dispute?

MR. MERCORELLA: None, your Honor.

THE COURT: I take it you are saying to this court there is no factual issue in dispute. It is a position which you will take throughout these proceedings. Very well, Mr. Spallone, you may step down.

If, Mr. Mercorella, you wish to direct a legal argument to the court I will hear you.

MR. MERCORELLA: Simply stated it is with regard to as I stated before the unbridled, unfettered responsibility of a legislator to vote in accordance with the dictates of his constituents and in accordance with his good conscience.

THE COURT: Certainly under normal circumstances that is the case. And as I said on Tuesday, if anyone were ever to tell me that I would be presiding in a litigation in which an elected public official was sought to be held in contempt for the manner in which he exercised his vote, that would be surprising to me. But you are aware, are you not, that we have reached a stage in these proceedings in which questions of liability were resolved by this court, by the Court of Appeals and with the denial of certiorari by the Supreme Court, that there was a consent order, that there were further orders of the court so that the act of the city council with respect to the adoption of the affordable housing ordinance was indeed in the nature of a ministerial act?

So that as I have indicated, corporation counsel or the counsel for the City of Yonkers suggested that the court itself do it. The suggestion that the matter was not ripe because there was a need for a public hearing would suggest that the matter was a matter which was subject to some type of majority vote or feeling the pulse of the community.

Any listener to the tape of the city council meeting will have no doubt as to the pulse of at least that segment of the community that attended the meeting. I think I understand your position. Is there anything you wish to say?

MR. MERCORELLA: I am merely stating, your Honor, that if there was a violation of your order, it was done by the counsel corporate body per se. I suggest to your Honor that individual councilmen cannot be punished for their moral and constitutional right to vote their conscience.

THE COURT: If the city council as a collective body is directed to do something and does not do it, are you saying that there is no individual responsibility on the part of the members of the city council who caused it?

MR. MERCORELLA: That is exactly what I am saying.

THE COURT: Then I understand that position.

MR. MERCORELLA: We are able to find no reported cases where a legislator acting in a legislative capacity -- and I take issue with the fact that this is a ministerial act on the part of Mr. Spallone. He was there to vote with his constituents. If that were a ministerial act, he would have been an automaton or robot. It was a ministerial act on the part of the council, but not on the part of --

THE COURT: When you say he is there to vote with his constituents, that is normally the case. But Mr. Spallone took an oath I assume. I am not familiar with the exact text of the oath taken by Yonkers city councilmen, but if it is like the oath taken by most public offices it is to obey and protect and defend the constitution. The constitution is not subject to the vote of a majority of the constituents.

The very purpose of a constitution is to say that even if a majority in a given community at a given time is of a contrary view, nevertheless, some things may not be done. Some things must be done.

So if what you are saying to me is that Mr. Spallone had a conflict between what he perceived to be the wishes of the majority of his constituents and what he was ordered to do by a federal court to remedy constitutional violations, and if he resolved that conflict in favor of what he perceived to be the views of the majority of his constituents, then he has made his choice. He has made his decision and it is a decision that he should honestly own up to and accept the consequences of.

MR. MERCORELLA: Your Honor, Mr. Spallone in his legislative capacity has constitutional and civil rights. As a legislator, he is not dutybound or not required to interpret the constitution. He is merely directed to vote his conscience in the final analysis whether it reflects the constituency or not.

THE COURT: So that, now we are really getting to the heart of it now. It is Mr. Spallone's position that assuming as we must a finding of overwhelming racial discrimination, an order of a federal court to remedy that, a direction to the authorized body acts on behalf of the city to take remedial action, he as a legislator is free to say regardless of the constitution, regardless of the findings of the court, regardless of the order, "I will not take that remedial action because my constituents do not wish me to do so"? That is your position?

MR. MERCORELLA: That is not entirely his position.

THE COURT: Tell me how my statement of it differs from your statement.

MR. MERCORELLA: His position is that apart from the fact whether he agrees with the order or with the underlying case, he has a right -- and I have said before -- unfettered, unbridled right to vote in a manner dictated by no one, no court no legislative body, caucus. The notice of intention which, of course, is a useless act. To vote for a notice of intention to act to something that won't bind him is absolutely futile.

THE COURT: You are raising an issue, the August 15th issue, and the notice of intent in the absence of a public hearing. If this were a matter which was to be resolved by a determination of the wishes of the majority of the citizens of Yonkers, then a public hearing might serve some purpose; but if as I have suggested, this is a matter in which the wishes of a majority of the citizens of Yonkers are not controlling, a majority of the citizens of any community may at any time decide if they don't like the First Amendment or the Fifth Amendment or the Fourteenth Amendment, or they don't like redheads, but the fact that that is the majority view does not exempt that community from compliance with the constitution. You don't quarrel with that, do you?

MR. MERCORELLA: That is self-evident.

THE COURT: You say it is self-evident, but listen to the tape of the meeting.

MR. MERCORELLA: The purpose of a public hearing is not to necessarily gauge the temperament of the community. It is to have input by experts with regard to zoning requirements, environmental problems, fiscal problems.

THE COURT: Do you know who drafted this ordinance?

MR. MERCORELLA: I think I do.

THE COURT: It was drafted by the experts retained by the City of Yonkers.

MR. MERCORELLA: Punish the City of Yonkers, but don't punish my client.

THE COURT: What else do you wish to tell me?

MR. MERCORELLA: I am saying that if the corporate body failed to do something your Honor directed, fine. I am suggesting that you had no authority to direct Mr. Spallone individually to violate his constitutional or civil rights as a legislator.

THE COURT: His constitutional right to disregard a federal order to remedy a constitutional violation to another group of citizens because he did not agree with that order? That is his constitutional right?

MR. MERCORELLA: Mr. Spallone was not even a party to any of these proceedings. Sua sponte you directed a council member to cast his vote in a negative fashion. That is all I am saying.

I don't quarrel with the fact that the majority should not rule where there are great moral and constitutional questions. The only legal issue I say is the fact that Mr. Spallone as dual elected representative casting his vote in good conscience should not be punished for the alleged 40 years of neglect by others and by incarcerating him or threatening to fine him is coercive and chills his constitutional rights. That is all I am saying.

THE COURT: Mr. Heffernan.

MR. HEFFERNAN: Good morning, your Honor. I think it is important here, your Honor, to focus on exactly why we are here this morning. We are here to see if Mr. Spallone should be held in civil contempt of this court's order. And to that extent, I think the issues here are narrower than what the court indicated before.

The first issue is did Mr. Spallone have notice? I don't think there is any doubt that Mr. Spallone had notice that this court issued an order on July 26th requiring the city council of the City of Yonkers to do certain things in order to bring itself into compliance with remedial orders in this case. Not only was Mr. Spallone here, but for anybody to make a claim he did not know what he was required to do on August lst is frivolous as far as we are concerned, your Honor.

There is no question, your Honor, about what Mr. Spallone did on August lst. He voted against the resolution. But, your Honor, we submit that the issue of intent in a civil contempt proceeding has absolutely no bearing. And I would like to cite the Supreme Court case of *McComb versus*

Jacksonville Paper Company, 336 United States 187. On page 191 I would like to read from what the court said. The court stated:

"The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is the sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.

"Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decrees was not fashioned so as to grant or withhold its benefits dependent upon the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions. And the grant or withholding of remedial relief is not wholly discretionary with the judge, as Mr. Justice Brandeis wrote in *Union Tool Company v. Wilson*. The private or public rights that the decree sought to protect are an important measure of the remedy."

I would cite your Honor to Second Circuit cases indicating the same thing with regard to intent. *Donovan versus Sovereign Security Limited* 765 F 2d 55 2d Circuit 1984, and *SEC versus American Board of Trade* 830 F 2d 331, 1987, 2d Circuit case.

Your Honor, Mr. Spallone's intent here is really not relevant. The fact of the matter is he had notice. And on August lst he voted knowing full well it would be a violation of the court's order and quite frankly I think it is as simple as that. He is in civil contempt.

One last thing, your Honor. Once again we are having the same argument in terms of accountability. The city should be held liable but not city councilmen. We heard the city say councilmen should be held liable and not the city. Under Mr. Spallone's view of things, an individual city council member is not bound by a court order that covers the city and

should be able to flout the constitution, flout lawful orders of the court just because his conscience tells him to do so.

Your Honor, the city is bound by this court's prior remedial order and also by the July 26th order. Under Rule 65 of the Federal Rules of Civil Procedure, the city council is bound. The city council is the governing body of the city. The city does not act except for the city council. Any argument that the city basically can avoid having to carry out a remedial order of this court or any federal court because city council members who must act in order for the city to carry out the order don't have to act is ridiculous. Thank you, your Honor.

THE COURT: Mr. Sussman

MR. SUSSMAN: Judge, we are here today as has been noted to deal with Mr. Spallone and whether Mr. Spallone is in contempt with one order of this court. And he obviously as Mr. Heffernan has shown is in contempt of that order of the court and realistically his counsel doesn't dispute that.

What counsel disputes is whether the court can require Mr. Spallone to vote a certain way. The court has already made that judgment. Mr. Spallone didn't vote that way and, therefore, he is in contempt. But as this matter obviously will be going to higher levels and as we didn't have an evidentiary hearing -- and I don't believe we will -- I do believe it is relevant to put in this record several other statements and observations that this gentleman has seen fit to make because I don't think the issue is altogether clear as to whether a reviewing court would think his intent does matter. I agree with Mr. Heffernan as the now controlling law, but the law may charge with regard to the issue.

MR. MERCORELLA: May I strenuously object. If your Honor precluded Mr. Spallone from stating the reason for intentions for voting the way he did, you shouldn't allow this. I don't think we should protract it by hearsay newspaper articles.

MR. SUSSMAN: This is not hearsay. We have already had rulings in this court as to statements which appear

verbatim in the Herald Statesman by Mr. Spallone or any other council member, and the court has already found that such statements are admissible. I don't believe these are hearsay statements. These are admissions by defendant in this lawsuit, your Honor, and they show very clearly that Mr. Spallone for a long period of time has had one intent and one intent alone to be held in contempt of this court. And I think for him to come in here --

MR. MERCORELLA: I object, your Honor.

THE COURT: I will hear your objection, but let the counsel finish his sentence.

MR. SUSSMAN: I think for him and his counsel to come in here and go to any other court with any other set of acts clearly on a record would form an improper predicate for that reviewing court to understand what is going on. I don't know that the reviewing court understands the detail of Yonkers. What has been going on here for a number of months is Mr. Spallone's overt statements inviting this court to hold him in contempt.

THE COURT: I will give you an opportunity to make statements.

MR. MERCORELLA: Mr. Spallone is not a defendant here in this proceeding. He is not even a party to any of these proceeding. That is a technicality. We forget the constitution and procedural acts.

THE COURT: I understand it is your position that he isn't a party. I disagree with you for these purposes.

MR. SUSSMAN: I am not going to belabor this and go back to January because we could go on for an hours or two, and I am not going to do that. But I think there are recent events in the last five or six weeks which should be spread on the record. If Mr. Spallone wants to disagree and say he didn't say these things, let him take the oath and said he didn't say that.

I don't think his court as it intimated earlier can allow a person in a responsible position to go around in light of an extant order and say whatever he wants for publication to arouse persons, and then come into a federal court and say something entirely different or say nothing. I don't think honestly that that is a fair circumstance.

Now, on June 28, 1988, the city council of Yonkers passed a resolution, your Honor, which specifically contravened an order of this court which required the condemnation of certain properties. And on that occasion Mr. Spallone stated, "If Judge Sand wants to hold me in contempt of court, he can. This is nothing more or less than happened in Nazi Germany. Perhaps Judge Sand forgets what a Swastika means."

Now, this was in reference to the resolution which he sponsored which related to withdrawal of a condemnation proceeding initiated pursuant to a lawful order of this court as it had been upheld in this court in subsequent proceedings to condemn a particular piece of property.

In further explanation of the action, he was quoted on June 30 as stating, "Unless the judge addresses the serious problems in low cost housing, we will contest him."

Comparing the judge to Adolf Hitler, he stated, "He can do what he wants, but I am not going to jeopardize the city." As the court recalls I am sure on July 12th we had a session here and the purpose of that session was to discuss what action this court should take to deal with the outstanding contempt of the City of Yonkers, its refusal to pass the affordable housing ordinance, and Mr. Spallone was quoted as saying as follows with respect to particularly the court's suggestion that a commission might be necessary here to implement actions in the city council, "I am not saying he is wimping out, but he has lost control of the case. I am not going to adhere to what he says."

When this court specifically indicated in a subsequent proceeding that Mr. Spallone and other members of the city council would be asked to pass this resolution which was the subject ultimately of the August lst meeting, Mr. Spallone

stated and I quote from July 23rd, "I am prepared to go to jail but I am not paying any fines. I am not going to be intimidated."

On the 27th of July on the front page of the Herald Statesman Mr. Spallone said, "I will fight this thing if I have to stay in jail 20 years." And finally as I explained last time -- I was not at the meeting--I have not yet been able to hear the tape.

THE COURT: I say with respect to the tape I inquired of the city whether there were additional copies of the tape, and I was told that was the only tape that had been made and I thought since it was part of the record that it was important that that be made available to the Court of Appeals as soon as possible. I understand that there is a video recording of that session, but that has not been available to me. And the only reason why I did not make it available to all counsel is because it was requested by the Court of Appeals.

MR SUSSMAN: Finally as it has been excerpted in the newspaper and I agree for purposes of completion, the Court of Appeals should make reference to the entire statement. Mr. Spallone is quoted as saying, "The people of Yonkers are not guilty of 40 years of intentional segregation." In part explaining his vote as we are here today to discuss.

I think the point is very clear. Mr. Spallone over a course of many months has taken a leadership position in the community opposing this court, using personal references that are abhorrent. I believe that his vote is entirely consistent with that philosophy which he enunciated in community meetings and elsewhere.

I think that if he wants to come up and defend himself, that is one thing; but for him to come to court and seek through technical explanation to justify contempt is is pretextural as the court found with two other councilmen. And frankly in my opinion it is bordering on perjury.

THE COURT: Mr. Spallone, do you wish to make a statement?

MR. SPALLONE: Yes.

THE COURT: Do you want to resume the stand? The court reminds you that are still under oath. How long do you wish for your statement?

MR. SPALLONE: Very short period. There are several items I would like to cover. One I would like to remind Mr. Sussman that I appeared on two public television shows in which Mr. Sussman engaged in conversation with me about this case and there were--

THE COURT: Now, let me say this is not a political forum. This is no a city council meeting. This is a legal proceeding and just direct yourself if you would to the issues of contempt. Those issues are whether you had notice, whether you in fact voted no, whether you were aware when you cast your vote that that was a violation of this court's order and that the consequences of that would be contempt. Are all of those conceded?

MR. SPALLONE: You are asking me to make a statement? May I? Conceded predicated on reason. And I think I have a right to give the reasons.

THE COURT: State your reasons. I reserve the right only to keep you within some reasonable bounds of relevance.

MR. SPALLONE: First my entire career in this case had been that I have never changed my vote and never changed my position. Number two, in the development of this plan I personally in January was not permitted to participate. I was distinctly left out. You can take the statements of the newspapers, of the mayor of this city that were discussing Yonkers. There were several other statements.

I had several conversations with the legal representatives. There were councilmen who had committed themselves to this plan. They had taken an oath. They went before a city council. They did their duty as I did. They did what they saw was fit as I saw was fit. To be held hostage today by two of those individuals who had made a commitment to you, and I assure you, your Honor, had I made that

commitment to you, I would have certainly carried that commitment out in this court. I did not make a commitment. Those two gentlemen that have in fact violated in my mind--

THE COURT: So I understand you, you are saying that it is your view that since you did not vote in favor of the consent decree, you had the right not to vote in favor of the August lst resolution despite the court's direction that do so? Is that what you are saying?

MR SPALLONE: Not exactly.

THE COURT: I am trying to understand you and not argue with you.

MR. SPALLONE: I know this is difficult. Let me see if I can put it in better words. There is a serious question here as to my right to represent the people of Yonkers. There is no question on the record that there is an admission of denial of my right to participate.

There is one thing here that disturbed me a great deal today. And I know politics. And this is a political thing and I don't think you would want to get into a political situation. A very legal situation. There were two gentlemen that had committed themselves that participated themselves. The plan has raised questions about my district. I think being left out most certainly placed me in an untenable position of being in a cabal.

THE COURT: If I can interrupt you. You see my focus and what your focus is. Let me call your attention to my focus. My focus is that after an extended trial and after an exhaustive study of the record in a 600 page opinion, I found that for 40 years there had been intentional discrimination in schools and in housing against the members of the class in Yonkers.

Now, you know that that decision has been affirmed by the Court of Appeals, the Supreme Court has denied certiorari. We are bound by that. You disagree with that. You argued on August lst that was not the case but the fact of the matter is in a country governed by law, that is a binding finding. Having

made that finding, it is everyone's obligation, everyone's obligation to remedy that violation. The internal machinations of the Yonkers city council, the politics or whatever goes on in the conferences among the political figures of Yonkers are really quite beside the point. The point being to grant relief to a group of citizens whose constitutional and other rights have been violated.

So that when you tell me that one of the reasons for your vote was because there was a cabal or politics or you were excluded from some conferences, excluded because for whatever reason you were excluded, that may be very interesting to the dynamics or the politics of Yonkers, sir, but it is entirely irrelevant to this proceeding.

MR. SPALLONE: I wish I can go forward. I know your decision. I understood your decision. You asked me about my vote. You asked about the question of reasoning. I think that there are certain questions regarding that plan that could be detrimental to the City of Yonkers.

I have a responsibility to see that the health, safety and welfare of this city is maintained. And if I felt in your order there were certain areas that could put this city in jeopardy, I would be violating my constitutional right and the constitutional representation of my people.

I have the photographs here of public housing only for one step that I am prepared to put before this court to show that the federal government has just as much responsibility for the conditions that exist in public housing today. And I am going to finish. And you gave me the opportunity.

THE COURT: Briefly and relevantly, please.

MR. SPALLONE: I have the Justice Department here. I have a scandal. Mr. Sussman, you can laugh.

MR. SUSSMAN: I am not laughing.
It is not relevant.

THE COURT: Please that is not relevant. That is not relevant. I rule that it is not relevant.

MR. SPALLONE: Let me state this. On many occasions we talked about the rights of individuals. The Justice Department is here and I say to you that we have a massive scandal in public housing in Yonkers which directly affects this case. I have the evidence and if I am going to, and predicated on everything I am predicating it on, I have evidence that the Justice Department through HUD--

MR. HEFFERNAN: I would like a ruling on relevancy.

THE COURT: Objection sustained. You may move on to another topic if you have anything further to say.

MR. SPALLONE: Finally I think there are rights when there are dangers to the city to vote no. And that is the question here, and that is the question I will stay by. I think it is legal and I am prepared to take it as far as I can. Thank you.

MR. MERCORELLA: Are you finished?

THE COURT: Thank you. You may step down.

MR. FONTANA: May I make a brief statement?

THE COURT: It is the usual rule in this court, one party, one counsel. What is it that you wish to say?

MR. FONTANA: I just want to recognize the distinction that the court is making between the liability phase of the litigation and the remedy face. There is no question that the rule of law requires that the City of Yonkers recognize the liability.

THE COURT: Sir, I suggest you have not heard the tape of the August lst conference. Perhaps you were there.

MR. FONTANA: No, I was not.

THE COURT: Of the city council.

MR. FONTANA: No, I was not.

THE COURT: Because Mr. Spallone there made a fuller statement which I indicated the court has heard and which is part of the record in the case in which one of the grounds asserted for his action was that there was an absence of racial discrimination.

MR. FONTANA: There may be a sense of feeling or view that there is no discrimination in the City of Yonkers. I did not wish to bring that up again because I accept the court's conclusion and the fact that it has been affirmed. But what we have here is a problem from Mr. Spallone's perspective is not denying that a remedy is required, but that the remedy suggested is not the appropriate remedy and is in the best interests of the City of Yonkers.

THE COURT: I am not aware of any affirmative suggestions that were presented to this court on behalf of the city of Yonkers. I know that there has been much attention focused on the problems which exist with respect to existing public housing in Yonkers and the multi-family dwellings, and I have often stated that the real effort that should be made and which will require dollars and energy and commitment is to make the housing which will be built in Yonkers attractive as compatible as possible with the surrounding neighborhoods, as safe and as secure as the citizens of Yonkers would want it to be in any event.

You realize now that this ordinance did not deal with the public housing. It dealt with the affordable housing. You will find and have the opportunity to read in Mr. Spallone's remarks to the city council discussion of the seminary site which is irrelevant to this aspect of the case.

MR. FONTANA: I just wanted to pick up on something that Mr. Spallone mentioned and I think maybe it is relevant in this case. And the fact is that two of the councilmen had voted in favor of the remedy going back in January of 1988. And it was that remedy that they have now changed their vote which has made the settlement of the litigation impossible to complete because those who are created, in

effect, the contract between this court and the City of Yonkers that the case would be settled along certain lines has now been broken by two councilmen--

THE COURT: It isn't impossible to complete. It certainly is possible to complete. All that is required to complete it is the comply in good faith with the orders of this court. Thank you, sir.

Anything further? This proceeding has been held pursuant to the order to show cause contained in the court's order of July 26, 1988. The proceedings with respect to Councilman Spallone were adjourned to this date at his request to enable the appearance of counsel. Counsel have appeared and have been heard and Mr. Spallone has been heard. There has been no request for an evidentiary hearing, no relevant factual issue is in dispute.

The court finds that Mr. Spallone had ample notice of this court's order, and of the consequence of its violation and that all of the procedural safeguards have been followed.

Mr. Spallone chose deliberately not to comply with this court's order. He has stated to this court and he has stated more fully to the city council on August 1 his reasons for doing it. The fact of the matter is that there were two choices before Mr. Spallone on August 1st: Compliance with the court's order or contempt of the order. He has made his decision. And it is a decision which controls these proceedings.

The court finds that Mr. Spallone is in contempt of this court's order of July 26th, that finding is retroactive to August 2, 1988, as I indicated on that date it would be; accordingly Mr. Spallone shall be personally fined $500 per day commencing as of August 2nd until such time as he has purged himself from contempt as is set forth in the order. The fine shall be payable by a check as set forth in the order and is subject to purging of contempt as is set forth in the order.

This is civil contempt. It is not punishment. It is intended to compel compliance. There being no request for an evidentiary hearing on behalf of Mr. Spallone, there is nothing further. I direct that the clerk hold the checks on

Mr. Spallone's behalf as it is with respect to the other city councilmen pending further proceedings in this matter.

I further advise you, Mr. Spallone, as you have been advised in the order, that if the necessary legislation as set forth by previous orders of this court is not enacted by, on or before August 10th, any council member who then remains in contempt shall be committed on August 11, 1988, to the custody of the United States Marshal for imprisonment until such time as there has been compliance with the order.

If there is a request for a written order to enable immediate appellate review, I will be available. I suggest that counsel prepare such an order and submit it to chambers and I will sign it forthwith. I believe that concludes this proceeding and we adjourned until 2:30 when we take up matters with respect to the school board.

MR. MERCORELLA: May we have a stay pending the appeal?

THE COURT: That is denied except that I have directed that the clerk retain the checks so that they can be refunded. The school matter I mis-spoke is at 2 o'clock.

(Luncheon recess)

AFTERNOON SESSION

2:00 p.m.

(In open court)

THE COURT: In United States against Yonkers, counsel present? I would like to take up some preliminary matters which deal with United States against Yonkers overall. The first matter -- and I direct this primarily to counsel for the City of Yonkers --and I recognize that now you are representing a municipal corporation, not the individual city councilmen; but nevertheless there is a message which I would like to relay. And if it should be in the form of an order, it can take the form of an order.

We are in an emergency situation and a situation which requires the availability at all times of all the participants in this matter. And then I assume that the city councilmen will remain in the Southern District of New York subject to this court's jurisdiction or will be in a location which will enable them to be present in court or at city hall in the matter of one or two hours.

Now, I would like to deal with the city council with a sense of mutual respect and comity and, therefore, would prefer to leave that as something short of a formal order, but if you would prefer that there be a formal order directing the members of the city council not to leave the jurisdiction of the Southern or Eastern Districts of New York without prior court approval, I can issue such an order.

MR. SCULNICK: As you are well aware, I am not representing the individual council members, but I will be glad to communicate that request to each of them. And if I encounter any difficulty in communicating that request, I will be glad to return to the court and if necessary advise you.

THE COURT: The second matter I would just like to state is I anticipate announcement before the end of business today of the appointment of an executive director for the office of fair housing implementation. The party involved is in transit to the city and I will await arrival in the city prior to making that announcement. But I anticipate that that announcement will be made before the close of business today.

The third matter that I would like to address relates to the city's fiscal crisis and the interrelationship between schools and housing. This is an action brought on behalf of a class alleging deprivation of rights with respect to both schools and housing. This court has entered separate remedy orders relating to schools and relating to housing. It would be a paradox and entirely unfair to the plaintiff class if the circumstances relating to implementation of the housing remedy were to operate to the detriment of the school remedy. And here, of course, we are dealing with the matter of dollars.

The Yonkers public school system and its efforts to implement the school desegregation plan should not be prejudiced because the City of Yonkers chooses to expend

funds in resistance to the housing implementation order. This court would be prepared to enter an order which embodies the principles which I have just enunciated and which would in effect require adherence by the City of Yonkers to the school budget previously agreed upon regardless of what other belt tightening or curtailment of public services might be required in order to satisfy fines or other costs and expenses incurred by the City of Yonkers in its intransigent resistance to implementing the housing remedy.

Will somebody for the school board prepare such an order?

MR. SCULNICK: Yes.

The city would object to distinguishing between the school teachers and policemen, firemen, sanitation workers. If the city ends up going bankrupt, I don't see what sense does it make for the school system to be continuing when the rest of the city has gone bankrupt?

THE COURT: The sense that it would make is that this court has found that there was a violation of the rights of the class with respect to housing and schools. And the purpose of this court is to remedy those violations and obviously we would run into a situation in which the plaintiffs, the plaintiff class, would be deprived of its school benefits because the City of Yonkers was also resisting efforts to remedy the violations with respect to housing. That simply cannot occur.

Now, if you are painting a picture to me of a city in which there are schools and in which there is housing, but there is a curtailment of every other public service, that is a responsibility of those who are representing Yonkers.

MR. SCULNICK: There won't be any public service at all. There won't be housing, or anything. What good does it do to separate artificially the schools from the rest? It just demonstrates the point that we have been making all along. This path of bankrupting fines has at its core the destruction of the City of Yonkers and trying to save as the court should the educational system will not work.

THE COURT: We have debated earlier this week the question of the responsibility for the "destruction of Yonkers". It is not the responsibility of this court. Please submit such an order.

Now, assuming as we may for purposes of the immediate proceeding before us that the school system is not impaired in its implementation of the court's desegregation order by any of the recent unpleasantness, we can turn to Dr. Pastore's advisory report on the Yonkers Board of Education motion to enjoin the State of New York and certain state officials as dependent parties in this action.

And I think the most helpful thing at the outset would be to have a statement of what the present conditions are with respect to the Yonkers school system. I note there has been much comment of late on that subject. Doctor Batista, perhaps the most helpful thing would be if you could give us from your perception as the superintendent of schools what the present situation is primarily as it relates to implementation of the orders.

MR. BATISTA: First of all, I want to thank you for your kind words this afternoon. And I want to thank you especially for the opportunity to provide you with a brief status report on the anticipated opening of the '88 and '89 school year. It is my belief that we have just concluded a most successful year in terms of our compliance with the court order regarding numerical desegregation. In addition I am extremely optimistic that this coming school year will be as successful and in some respects may exceed last year's results.

At this juncture in readying for a new school year I wish to reflect upon two significant ingredients which would account for my optimism. The balloting process conducted this year continued to allow for a voluntary choice process and a commitment on the part of the district to accommodate parties as long as the accommodation supported desegregation.

The results of that process indicate to me that our programs are not only attracting students, but retaining them. The low number of requests for changes about 380 indicate general satisfaction by parents and students.

Secondly, the usual and yearly issues over budget, teacher assignments, textbook and supply requisitions and employee contracts have all been resolved much earlier than usual, thanks in large parts to the efforts of Dr. Pastore. This has allowed for better planning and a clear sense in the community of stability, direction, and certainty, notwithstanding the recent action by the court in the pending bankruptcy of the city.

I continue to remain optimistic and would like to emphasize that as a result of the continued support, commitment, and dedication of the trustees of the board of education and the entire certificated and noncertificated staff of the school district and the support of the student body and parents, it is apparent that our enrollment has leveled and may possibly rise.

Our schools with the exception of public school 19 will be in compliance with the desegregation order of the court and the issues of stemming white flight is encouraging.

As of July 20, 1988, the number of students who have enrolled for September, 1988, is 18,211. This figure is approximately the same as last year at this time. Assuming the usual mobility rate and the expected new registrant enrollment just prior to the opening of the school, I foresee a BEDS Day enrollment figure and membership figure at least equal to the 1987, 1988 school year. In other words, the enrollment is holding and may even increase slightly.

In addition, I fully expect to have all schools except school 19 in compliance with the desegregation parameters. If the district were frozen as of July 20th, this in fact would be the case. And finally, I wish to note that on BEDS Day, 1987, the number of nonminority students exclusive of special education in the district totalled 7,558 or 45.8 percent of the total student population. On July 20th our July 20th data showed 7,733 nonminority students exclusive of special education representing 46.5 percent of the total student population. These figures predict an increase of 175 nonminority students on a district-wide basis and are

encouraging in dealing with the issue of white flight especially at the elementary level.

The secondary level continues to give me some concern. The breakdown of the nonminority students exclusive of special education on July 20th indicate that on the elementary level as of now compared to the BEDS Day of 1987 we have an increase of 315 nonminority students on the junior high level, an increase of 27, and on the high school level a decrease of 167 which is the net of 175.

I am fully aware that my optimism is not shared by some members of the community and I have heard and read that in the opinion of some the educational improvement plan that we have implemented for the last two years has destroyed our school system. In my view that opinion is just plain wrong.

Through EIP 1, we have already made significant gains in improving educational offerings to students. More importantly we now have the potential to provide quality effective and integrated education to all the children in the City of Yonkers.

Notwithstanding my optimism as the court very well knows, the numbers tell only one side of the story. The other side providing equal opportunity programs for all students and addressing the vestiges of segregation is perhaps more important. Therefore, I would be remiss if I failed to express the urgency of obtaining this, the support needed for the implementation of EIP II.

Carrying out a plan like EIP 1 to improve racial balance in the schools is not without problems. In a relative sense, however, it is easier than remedying the profound educational social and psychological damage to students which segregation causes. Research and experience with desegregation shows that it is naive to rely solely on contact theory that proposed if minorities and nonminorities are merely in contact with each other the result will automatically be positive social, psychological, and education development, improved self-esteem, reduction in hostility and the enhancement of positive

interracial attitude. Access and contact are necessary first steps but they are just not enough.

In fact contact alone at least temporarily can cause more tension and problems as minority and and nonminority students and teachers who have previously been segregated first begin to interact with each other. In our experience with desegregation over the past two years we have seen some of these problems. A disparity in achievement between minority and nonminority students, increases in discipline cases, and higher retention rates among minority students, problems that can make or break the success of desegregation in Yonkers.

We are now at a critical juncture in the desegregation process, the first substantive step in the integration process. We must attack directly the educational, social, and psychological vestiges of segregation and give minority and nonminority parents a sense of continuity, success, and stability in our schools if we really want desegregation to work in Yonkers public schools. That is why we propose EIP II and now I urge prompt action so that it can be implemented.

In conclusion I wish to thank you for this opportunity to report for the record on the current status of desegregation. I am optimistic over the data we offer over the opening of the school year and I do have copies of my report which I will be glad to leave with the court and happy to answer any question you have.

THE COURT: I don't have any questions. Any counsel wish to comment on that? Thank you for that report.

MR. SUSSMAN: I would like to make a brief comment for the NAACP about the report. We have had the pleasure of working with Dr. Pastore and Batista and his staff for the last several years and I want to applaud their strong leadership, positive direction, enthusiasm for the plan, and to report to the court that there has been grade concordance in views and sharing of dialogue between us and the meeting chaired by Dr. Pastore.

I don't know if the court gets reports of those meetings. I do think that is a model frankly that has been a very

positive one in terms of cooperation between the parties and, frankly it is my hope that we could replicate that model with the commission on the housing side. Thank you.

THE COURT: I believe I made the comment earlier this week in the housing context when we were talking about the Yonkers community, that the experience with the school system dealing with the same demographics and the same community shows what can happen when there is good will, appropriate motivation, and a desire to achieve the result.

Thank you for your report, Dr. Batista. It is helpful to have the facts. Let's turn then to Dr. Pastore's advisory report and the recommendations.

I have received written comments from the NAACP on that. Who wishes to be heard with respect to Dr. Pastore's report?

MR. LISKOV: I am Richard Liskov, Deputy Chief Litigation Bureau with the Attorney General, State of New York. With me this afternoon if I might introduce my colleagues. Stephen Jacoby, Assistant Attorney General, Harold Isehn, Assistant Counsel for the government, Robert Diaz, Counsel State Education Department. Accompanying us, your Honor, are Arthur Walton, Deputy Commissioner, State Education Department for School Improvement and Support, Sterling Keyes, Director of Civil Rights and Intercultural Relations Division, State Education Department, and Chip Foster, Principal Budget Examiner.

Your Honor, in response to the monitor's advisory report, the state wants to thank Dr. Pastore for his positive approach which we largely endorse. As you know, the state has consistently agreed with the goals of the plaintiff, the goals of the Yonkers Board of Education. The only difference is methodology. We believe that the approach that Dr. Pastore has advocated is essentially the right approach, one that is conductive to cooperation, to progress, to agreement.

As Dr. Batista eloquently said the need is great for prompt action. We believe that that can be accomplished without litigation and that litigation is the last and least

appropriate means for accomplishing that as your Honor said on November 5th when he asked the state and Governor Cuomo to consider the needs of Yonkers children. What we would like to do in the next few months in a critical period when the fiscal year '89, '90 budget is prepared in cooperation and consultation with the Yonkers board, plaintiff and intervenor plaintiff with the City of Yonkers is we would like to focus and remain focused on the children of Yonkers and not on the lawyers.

Your Honor, we will be glad to supplement my remarks if you have particular questions as to the state's current efforts. I should point out that discussions have already taken place between members of the Education Department and Executive Branch and legislative staffs with regard to funding that may be needed to implement certain parts of the EIP II plan. Legislative staffs are sensitive to the needs, special needs of Yonkers Board of Education. And we remain committed in meeting those needs.

THE COURT: Thank you.

THE COURT: Who else wishes to be heard?

MR. SUSSMAN: May it please the court, thank you, your Honor. On November 5, 1987, on the motions of the school board and NAACP, this court did set a schedule for the production of EIP II as I am sure the court recalls and then for its consideration. As Dr. Pastore reports, unfortunately that schedule was not met in form and in my opinion more importantly was not met in substance. The dates of the meeting are less important than what really didn't transpire as I thought was contemplated clearly by the court.

Of course, it is everyone's belief that litigation is not the best way and doesn't have to occur, and we don't have to have a trial in the matter with regard to state liability and the consequences of that liability. However, I believe that the proposal which is being forwarded by Dr. Pastore and endorsed by the state is one which essentially leaves all of the leverage in that process with the state. By that I mean that we are not preparing for litigation. We are not taking steps which

in my opinion provide the state with added incentive which I believe it needs to negotiate in this manner seriously.

THE COURT: What?

MR. SUSSMAN: I have recommended in my proposal contrary to Dr. Pastore's suggestion, that the court not stay preliminary discovery in this matter, for example.

THE COURT: That is a matter of preserving the testimony of one or two individuals, is that it? Tell me the scope of the discovery that you would wish to conduct while the process set forth in Dr. Pastore's report takes place?

MR. SUSSMAN: I believe there are two sorts of discovery. The most important being documentary discovery as opposed to preservation. Although preservation is relevant, there are agents whose deposition who have been with the state for a period of time. Depositions with respect to the state's knowledge and intent would be necessary. And the sooner those persons are deposed given the long expansive time passed in this event, the better.

I think documentary discovery is equally relevant here. The state of knowledge that the state had and what was reported to the state through this period of time should be ascertained at an early date so that all parties can appreciate in light of the prevailing law the strength of the various cases. I believe to prolong the period of litigation is unwise.

THE COURT: If your request is for an order of document preservation, I would doubt very much that there would be any objection to such an order.

MR. SUSSMAN: I think the cases can best be understood if the documents were in fact produced or made available for review not simply preserved. But beyond that, judge, I think that what we have to avoid here to the extent possible is misguiding the court with regard to optimistic predictions.

My concern at this stage as it has been throughout this litigation is that we identify realistically the potential for an

agreement, especially at this time, almost a year after November when we met. And it seems to me we should have a little bit more concrete understanding in light of the EIP II as to where we are, not simply statements that we are all in favor of the children of Yonkers. We assume that. We hope that.

So it seems to me that from the plaintiff interveners point of view we have not been included in the meetings. We have a great deal of concern that there really is a substantive discussion intended as to the problematic needs as identified in EIP, not reliance on the City of Yonkers to evaluate those needs which is unrealistic, and a good faith commitment that as we proceed with the initial phase of discovery those needs will be analyzed and to the extent the stay can, met.

I take it from the comments of counsel for the state today, that that is their intent. And if that is their intent, I believe the only change in schedule should be discovery permitted to proceed on a limited basis with the identification of several witnesses whose testimony seems relevant and document discovery allowed to proceed. And then a timetable.

THE COURT: But you limited depositions that is easily defined. That is one or two people and a date and a place. But you have lightly brushed over document discovery which we all know can be a tremendous undertaking which consumes a great deal of time and effort and which sometimes is distracting from nonlitigation activities.

MR. SUSSMAN: I think the conundrum we are faced with to some extent is one that comes out in other litigation context, and which certainly occurred earlier in this case. We put the matter of litigation to some extent on the back burner in the hopes that parties reach accommodation which is certainly rational. But the problem is the litigation itself and the prospects of the litigation fortunately or unfortunately inspire parties to take position in settlement which are more realistic. And I think that is the situation we have here.

THE COURT: Sometimes that happens and sometimes it causes a stiffening of one's back and a generation of an environment of hostility sometimes.

MR. SUSSMAN: We have heard this argument before and we have gone through it so many times.

THE COURT: I was thinking in 1980 when the city sought to enjoin the commencement of the suit on the grounds that efforts at conciliation had not yet been exhausted. And there is no absolute rule as to which is appropriate. This is not a matter of being consistent. One has to deal with the evaluation of the good faith of the parties, whether they view them as merely a putting off of what may be an unpleasant circumstance or whether this is a good faith effort to achieve more by consensus than can be achieved in an adversarial serial position.

MR. SUSSMAN: That is why I alluded earlier to the eight-month period. I don't want to belabor everything that went on during that period. I think it casts relevance on the precise point your Honor made.

THE COURT: Let me put aside the question of depositions to preserve testimony. That is a recurring problem that I will face more than once this afternoon.

Is there not some interim date, some road mark in the progression of events contained in Dr. Pastore's report which would enable the NAACP, Dr. Pastore, anyone else to evaluate the rate of progress and to say this is a process which has promise and should continue or this is a promise which whether it continues or not should be parallel to litigation?

MR. SUSSMAN: If your Honor would refer to page 9 of Dr. Pastore's report?

THE COURT: Yes, I have it in front of me.

MR. SUSSMAN: And I think this is the critical function and I perceive the situation. In 2 A it refers to a process of analysis of EIP II which essentially as I understand what he is suggesting leads to a point where the state and the School Board agree this is EIP and this is what is necessary. This is what is necessary to deal with the vestiges identified.

Frankly, it is my unfortunate suspicion that that process is one where there will be or may be substantial problems. And if we get to that process and make a good faith effort to narrow from the state's point of view, as I understand their prior submissions, or clarified from the school board's point of view what they believe necessary and cannot come to substantial agreement, that will define the willingness of the state to make commitment. If they want it so narrow EIP II finds it meaningless and EIP says it doesn't address the vestiges we can't do much. That is the guts of the process.

THE COURT: That definitionally is a process which would be concluded by when?

MR. SUSSMAN: I think November lst.

DR. PASTORER: November lst with an interim report October 7th.

THE COURT: I am putting aside the question of deposition of persons for purposes of preservation of testimony. November lst is not so far away, why would it not be appropriate for me to adopt Dr. Pastore's recommendation and report. Unless there is objection for me to do so in this case, I will hear from the parties with the inclusion of the representative of the NAACP in the process without prejudice to an application subsequent to November lst predicated on a showing that the experience has indicated that there should be a commencement of litigation.

MR. SUSSMAN: That is fine, but there is one proviso that I think is important. That showing should not have to include, from my point of view at least, either if it be by the school board or NAACP the convincing of the court that what we believe necessary to cure the vestiges is substantively necessary. You see then we just get into a circle if you follow me.

THE COURT: No, I don't follow you.

MR. SUSSMAN: Let me say on November lst what we come back with is a report that the parties disagreed what should be in EIP II. Now, Dr. Pastore contemplates in his

report some agreement by the parties which they can then go forward with by then.

The showing in my judgment after November 1st should simply be that good faith efforts have been made by the parties to come to an agreement and that the parties in fact are so divergent that reasonably they cannot come to an agreement. That is a different showing than the showing that the school board and the NAACP are right as to what is necessary.

THE COURT: I don't think I should prejudge that. The issue on November 1st will be: Is the process which is ongoing one which satisfies the court that it is the most fruitful, expeditious course to take? And if it doesn't, then some other course will be undertaken.

MR. SUSSMAN: I agree with that position, and I am satisfied with that. As long as the NAACP which has a motion pending can be a participant. We have a great interest in the proceeding as well as the measure taken and experience with regard to the measures.

THE COURT: Any objection?

MR. LISKOV: The state has no objection but I would like to clarify one thing and that is that I do not understand your Honor to at this point be indicating that it will grant the pending motion.

THE COURT: I am not. I am not indicating one way or another. I deferred that on the merits.

MR. LISKOV: I would like to get a copy of the plaintiff intervenor's comments.

MR. SUSSMAN: I mailed it to Ms. Clipmensberg.

MR. MINCEBERG: Elliott Minceberg from the school board. I think the proposal comes up with an outline that makes sense. We need to resolve the details to implement it particularly with respect to the depositions of witnesses which we think will probably be only three or four.

THE COURT: You have had some informal discussions as to who those witnesses will be and the persons by virtue of age or health --

MR. MINCEBERG: They are former members of the Board of Regents of New York, people of that nature who are essentially third parties at this point who are aged. We want to make sure their testimony can be preserved. And I think one alternative method of making sure we can take those depositions would be to grant the motions but stay all proceedings except for those depositions. If the state was willing to do it in some other way, that would be fine too.

THE COURT: It is permissible to take depositions to preserve testimony prior to the granting of that motion, and I think that that is the preferable way to proceed. There is persuasiveness to Dr. Pastore's concern about injection of an atmosphere of adversarialness, I think. I have not determined the merits of the motion so I am not going to grant the motion simply to provide a means for the preservation of testimony.

MR. MINCEBERG: The only thing I would ask is as long as the state has no problem with consenting to having those depositions taken in advance of their being made parties to the case and having those depositions be usable as though they were taken at a time they were parties to a case --

THE COURT: How many depositions are we talking about?

MR. MINCEBERG: In the neighborhood of three to five at the most.

THE COURT: Do you have any problem?

MR. LISKOV: I only can state that the requirements of Rule 27 be satisfied and in terms of they can perpetuate testimony prior to an action being commenced, it requires more than just a notice of deposition. It requires a petition.

THE COURT: What is it that is required that you believe is lacking here?

MR. LISKOV: I believe what is required is a petition that states whom they would like to depose, the reasons for --

THE COURT: That is why I asked whether you had discussed that. I had heard one or two names.

MR. LISKOV: Not at all. We never had any discussion.

THE COURT: Why don't we leave it this way: You discuss that. I hope that won't be a problem.

THE COURT: I think it would be counterproductive to a very great extent if I were compelled to decide the motion to join the state as a party at a date earlier than would appear to be appropriate in light of all that we have said simply because it was an essential condition for the taking of the deposition.

Why don't you discuss that and see if you can reach a consensus. If you can't reach a consensus, Dr. Pastore's shoulders are so broad that I don't hesitate to add additional burden to them. And obviously if it can't be resolved in that fashion, an application can be made to me.

Is there any objection to the participation of the NAACP in this procedure?

MR. MINCEBERG: We do not object, your Honor. November lst is a trigger date. Is it contemplated that if there is a concern that the procedure is not proceeding in the way that we hoped that there would need to be a motion filed by the NAACP --

THE COURT: There should be some document which me, and a motion is as good as any, which advises me that that state of affairs has in the opinion of the movant been reached. And that is a right available to any party. It need not be the NAACP. I would think a motion, but it can be a simple motion which tells me what has occurred.

I will endorse this as adopted and approved subject to the matters agreed upon in this conference.

Peter Chema's August 4, 1988 Notice of Appeal of District Court's August 2, 1988 Order

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,

Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from a judgment of civil contempt entered by District Judge Leonard B. Sand in this action on August 2, 1988.

Dated: New York, New York
August 4, 1988

BOWER & GARDNER

By: _____
Attorneys for Peter A. Chema
110 East 59th Street
New York, New York 10022
(212) 751-2900

TO: MICHAEL W. SCULNICK, Esq.
Vedder, Price, Kaufman, Kammholz & Day
Attorneys for City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017

BRIAN HEFFERNAN, Esq.
Attorney for Department of Justice
Civil Rights Division, Room 7525
United States Department of Justice
10 and Pennsylvania Avenues, N.W.
Washington, D.C. 20035-6998

MICHAEL H. SUSSMAN, Esq.
Sussman & Sussman
Attorneys for Plaintiff-Intervenors
Yonkers Branch National Association
for the Advancement of Colored People, et al.
30 S. Broadway
Yonkers, New York 10701

JOHN H. DUDLEY, Esq.
Butzel, Long, Gust, Klein & Van Zile
Attorneys for Defendant Yonkers Board of Education
1650 First National Bldg.
Detroit, Michigan 48226

RAYMOND LARIZZA, Esq.
Civil Division, Room 3724
United States Department of Justice
10th & Pennsylvania Avenues, N.W.
Washington, D.C. 20530

OSCAR NEWMAN
Institute for Community Design Analysis
66 Clover Drive
Great Neck, New York 11021

LAWRENCE R. SYKES, Esq.
Attorney for Councilmembers Longo & Fagan
20 South Broadway
Yonkers, New York 10701

VINCENT FONTANA, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker
Attorneys for Councilmember Spallone
420 Lexington Avenue, 22nd Floor
New York, New York 10170

Order Adjudging Henry G. Spallone in Contempt (Sand, J., August 5, 1988)

IN THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, et al.,

v.

YONKERS BOARD OF EDUCATION, et al.

Civil Action No. 80 Civ. 6761 (LBS)

----------X

ORDER

On July 26, 1988, this Court entered an Order requiring the City of Yonkers to pass on or before August 1, 1988 the legislative package relating to the long-term plan as described in section 17 of the first remedial consent decree in equity dated January 28, 1988 and the long-term plan Order dated June 13, 1988 ("affordable housing ordinance"). Following entry of that Order, counsel for the city raised a number of questions as to the applicability of state law provisions relating to amendments to the city's zoning ordinance. Rather than deal with any question of federal preemption, this Court notified counsel for the City and the plaintiffs by letter dated July 28, 1988 that compliance with its July 26th Order could be met by adoption by the City Council of a resolution committing the City to enact the affordable housing ordinance within the time prescribed by notice pursuant to state law.

The July 26th Order further provided that, upon the City's failure to enact the legislative package as required, the City and its individual City Council members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1, 1988, the City Council, by a vote of 4-3, refused to adopt the required resolution. Members of the City Council voting against the resolution were identified as Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan and Peter Chema.

At the hearing, the individual Council members were called to appear and show cause why they should not be adjudged in civil contempt of the July 26th Order.

Council member Spallone advised that he had not yet obtained counsel, but desired to do so. Although this Court believed that Mr. Spallone had adequate notice to retain counsel as of August 2nd, this Court adjourned the hearing on his possible contempt until 11:30 a.m., August 4, 1988, to assure his representation by counsel.

At 11:30 a.m. on August 4, 1988, Mr. Spallone appeared with counsel at the adjourned hearing and was given an opportunity to show cause why he should not be held in civil contempt of this Court's July 26, 1988 Order. Having considered the arguments of all parties and the Council members, this Court finds as to Mr. Spallone:

1. That he received adequate notice as to his duty under the July 26 Order;

2. That at the hearing on August 4, 1988, he had an opportunity to be heard;

3. That he had the ability to comply and a full understanding of the consequences of his non-compliance; and

4. That he received adequate notice of the need to retain counsel prior to the August 2nd hearing and that any claim on his part of inadequate representation due to a lack of time to consult with counsel must fail. Any such delay in consultation must be attributed to the Council members themselves and not to this Court or the parties.

Accordingly, Mr. Spallone is hereby adjudged to be personally in civil contempt of this Court's July 26, 1988 Order.

Therefore, it is hereby ORDERED that Mr. Spallone:

1. Retroactively to August 2, 1988 shall be personally fined $500 per day every day until such time that he purges himself of contempt by voting to enact the affordable housing ordinance, or a resolution of intent to adopt the same, or such time that the City has so acted. Payment of these fines shall proceed as set forth in paragraph 4 of this Court's July 26, 1988 order. The first three checks are due and payable pursuant to this paragraph shall be held by the Clerk of the Court until August 12, 1988, or until this Order is affirmed on appeal, preserving the Clerk's power to refund such payments should this Court find reasons between now and August 12th to set aside these findings of contempt;

2. Any such Council member who has not purged himself of civil contempt on or before August 10, 1988 shall be committed on August 11, 1988 to the custody of the United States Marshall until such time as the City enacts the legislation or until such council member purges himself of contempt. The contempt fines shall continue during any time of imprisonment.

It is further ORDERED that the application of Mr. Spallone for a stay of this Order is denied, except as provided in the first decretal paragraph of this Order.

So Ordered:

Dated: New York, New York
Aug. 5, 1988

/s/For Hon. Leonard B. Sand
USDJ and with his
authorization

/s/Louis L. Stanton/CD
United States
District Judge
Part 1

Henry Spallone's August 8, 1988 Notice of Appeal of District Court's August 5, 1988 Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America, Plaintiff-Appellee, and Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiff-Intervenors-Appellees, -against- Yonkers Board of Education, City of Yonkers and Yonkers Community Development Agency, Defendants-Appellants,	)	80 CIV 6761 (LBS) NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Henry Spallone, a non-party to this action, hereby appeals to the United States Court of Appeals for the Second Circuit from an order of the United States District Court for the Southern District of New York (Stanton, J. for Sand, J.) imposing continuing sanctions upon Henry Spallone for civil contempt of court, signed on August 5, 1988 and filed in the office of the Clerk of the Court and entered on the 8th day of August, 1988.

Dated: New York, New York
August 8, 1988

Yours, etc.

WILSON, ELSER,
MOSKOWITZ, EDELMAN
& DICKER

By: JAMES L. FISCHER/s/
(A Member of the Firm)
Attorney for Contemnor-
Appellant Henry Spallone
Office and Post Office Address
420 Lexington Avenue
New York, New York 10170
Telephone: (212) 490-3000

See Counsel List Attached

Decision and Order of United States Court of Appeals, Second Circuit, Dated August 9, 1988

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of August one thousand nine hundred and eighty-eight.

PRESENT:
HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE JON O. NEWMAN,

HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

----------X

UNITED STATES OF AMERICA,

Appellee,

-against-

YONKERS BOARD OF EDUCATION, et al.,

Appellant.

88-6178
88-8072
88-8074
88-8076

----------X

The City of Yonkers and four individual council members, Nicholas Long, Edward Fagan, Peter Chema, and Henry Spallone appeal from orders of the United States District Court for the Southern District of New York, Judge Leonard B. Sand, dated August 2, 1988, holding appellants in civil contempt of court. Appellants have moved for a stay of these orders. The motions for a stay are granted as of this date and

the stay shall continue only until the appeals are argued on Wednesday, August 17, 1988 at 2:00 p.m. in the United States Courthouse at Foley Square. The briefs of all parties are to be filed by 12:00 noon on Monday, August 15, 1988. The briefs need not be printed but may be submitted in typewritten or other appropriate form.

Chief Judge Feinberg and Judge Mahoney believe that appellants have barely satisfied the standards for a stay pending appeal and that in view of, among other things, the serious consequences of the escalating fines to the City of Yonkers, a brief stay is warranted pending argument of the appeals.

/s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

/s/ J. Daniel Mahoney
J. DANIEL MAHONEY
Circuit Judge

NEWMAN, J.: Believing that none of the appellants has presented any issue with a likelihood of success on appeal and that the public interest is better served by a clear indication to all concerned that continued violation of the consent judgment agreed to by the City of Yonkers must promptly end, I respectfully dissent from the order granting the stays.

/s/ Jon O. Newman
JON O. NEWMAN
Circuit Judge

Peter Chema's August 10, 1988 Notice of Appeal of District Court's July 26, 1988 Order

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and
YONKERS BRANCH NAACP, *et. al.*,
Plaintiff-Intervenors,

- *against* -

YONKERS BOARD OF EDUCATION,
CITY OF YONKERS and YONKERS
COMMUNITY DEVELOPMENT AGENCY,
Defendants.

NOTICE OF APPEAL

80 Civ. 6761 (LBS)

Notice is hereby given that Peter A. Chema appeals to the United States Court of Appeals for the Second Circuit from an order entered by District Judge Leonard B. Sand in this action on July 26, 1988.

Dated: New York, New York
August 10, 1988

BOWER & GARDNER

By: _____
Attorneys for Peter A. Chema
110 East 59th Street
New York, New York 10022
(212) 751-2900

TO: MICHAEL W. SCULNICK, Esq.
Vedder, Price, Kaufman, Kammholz & Day
Attorneys for City of Yonkers
1 Dag Hammarskjold Plaza
New York, New York 10017

BRIAN HEFFERNAN, Esq.
Attorney for Department of Justice
Civil Rights Division, Room 7525
United States Department of Justice
10 and Pennsylvania Avenues, N.W.
Washington, D.C. 20035-6998

Affidavit of James Harmon Requesting Stay of Judgment, Dated August 16, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

In the Matter of PETER CHEMA,

Appellant,

----------X

UNITED STATES OF AMERICA,

Appellee,

- and -

Docket No.: 88-8074

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

AFFIDAVIT

Plaintiff-Intervenors,

- against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

----------X

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

James D. Harmon, Jr., deposes and says:

1. I am an attorney with the firm of Bower & Gardner which represents Councilman Peter Chema. I submit this affidavit and the annexed affidavit of Peter Chema in support

of his motion for the extension of a stay pending appeal and for a stay of the district court's order dated July 26, 1988.

2. On August 8, this Court issued a stay pending appeal lasting through oral argument to be held tomorrow, August 17th. In addition, by letter dated August 10, 1988, this Court said that the order of July 26th had not been stayed and that:

> Council meetings at least once each week seem to be an eminently sensible way of affording an opportunity for compliance with the [consent decree of January 28, 1988].

3. The district court's order of July 26th, does not explicitly call for a vote on the Affordable Zoning Ordinance at weekly meetings. The order refers to meetings "for the purpose of voting on the legislative package," Order dated July 26, 1988, ¶.6, in the context of providing the opportunity to purge any contempt. But, in the spirit if not the letter of the order, a vote was taken last night as Councilman Chema has explained. See, annexed affidavit.

4. We do not believe that any further votes on the legislation should be taken under court direction while the matter is under appellate review. Rather, we believe that the opportunity to purge any contempt should always remain available, but that any further votes, as opposed to mere meetings, should not occur under court direction.

5. Our position requesting a stay of the order of July 26, 1988 is based on two factors. First, the public interest would benefit from a calm and resolute review of the unprecedented issues raised in this case, as opposed to the widespread media attention attracted to any further votes which produces much turmoil. Second, as we point out in our reply brief, neither the government nor the NAACP has supported their position with any persuasive authority. The government has not at all defended its advocacy of a district court order which denies Councilman Chema the right to speak freely and to vote his convictions. In fact, with respect to the First Amendment prior

restraint issue, the government has totally ignored the point and has exercised its right to remain silent.

6. This Court should also extend the stay of the judgment of civil contempt until this Court decides the appeal. The stay expires when the appeals are argued on August 17, 1988, and does not run to the time when this Court decides the appeals. Thus, unless the stay is extended, Mr. Chema will be incarcerated and will incur substantial fines while the appeals are pending. This would be a great injustice, especially if the district court's judgment is reversed. Therefore, the stay of the judgment of civil contempt should be extended until this Court decides the appeal.

7. Should this Court affirm the judgments below, then this Court should stay the judgments pending defendant's appeal to the United States Supreme Court.

WHEREFORE, this Court is requested to issue a stay of the contempt judgment dated August 2, 1988 and the imposition of sanctions and issue a stay of the district court's order dated July 26, 1988, and extend the stay of the contempt judgment dated August 2, 1988.

/s/ James D. Harmon Jr.
JAMES D. HARMON JR.
BOWER & GARDNER
110 East 59th Street
New York, New York 10022
(212) 751-2900

Sworn to Before me this
16th Day of August 1988

Affidavit of Peter Chema, Dated August 17, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF PETER CHEMA,

Appellant,

UNITED STATES OF AMERICA,

Appellee,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

Docket No.:
88-8074

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Peter Chema deposes and says:

1. I am a city Councilman of the City of Yonkers, now representing the Second District on Yonkers West Side, where I was born and raised.

2. I was elected to my present office in an election held in November 1987. Thereafter, in votes taken by the City Council, I voted against City approval of the consent decree entered on January 28, 1988 and against City approval of the Long Term Plan Order entered on June 13, 1988.

3. This is my third term as a City Councilman, the first two occurring during the years 1980-1984. At that time, I represented Yonkers' First Ward (also on the West Side) which then contained most of the City's subsidized housing. I was elected as a Republican in an area which was overwhelmingly registered as Democrats by a margin of about 6:1.

4. I have always been an advocate of my constituents' right to live in decent housing. For example, during my first term as a Councilman, I travelled by bus to New York with my constituents and testified in court on their behalf in a civil suit. In my testimony, I described substandard housing conditions as I had seen them and from an engineering perspective, drawing upon my education and college degree as a civil engineer.

5. Many of these conditions continue to persist on the West Side. The district court's Long Term Plan does nothing to address those people left behind in substandard housing on the West Side.

6. Last night, the City Council voted on the Affordable Housing Ordinance. I voted because I believed and was advised that paragraph 6 of the district court's order of July 26th and this Court's interpretive letter dated August 10, 1988 required me to vote.

7. At last night's public City Council meeting many people from Yonkers gave their views. Overwhelmingly, they urged the City Council not to approve the legislation.

8. In casting my voice vote last night against the zoning ordinace, I said the following:

> I cast my vote in the exercise of my First Amendment right to freedom of speech and to vote. I also cast my vote as a representative of my constituents to give meaning to their First Amendment right to petition the government through their elected officials.
>
> I vote today because I have been ordered to do so. My conscience will not permit me to vote "Yes" because I have been ordered to do so.
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution which I believe is the supreme law of the land. I welcome the chance to present my position to the Court of Appeals this Wednesday.

9. I do not believe that it is in the public interest to continue weekly City Council meetings at which votes are taken under Court direction while this matter is under appellate review. Nonetheless, if this court grants a stay of the July 26th order, I will remain available day and night to attend a City Council meeting to reconsider the legislation when so requested by any

member of the Council. Finally, I consent to the issuance of a stay on such a condition.

PETER CHEMA

Sworn to before me this
17th day of August, 1988
Nancy L. Vincent
Notary Public, State of New York

No. 31-4787243
Qualified in New York County
Certificate Filed in New York County
Commission Expires Aug. 31, 1989

Respectfully submitted,

BOWER & GARDNER

By: _____

JAMES D. HARMON, JR.
Attorney of Record
110 East 59th Street
New York, New York 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

Order of United States Court of Appeals, Second Circuit, Containing Stay and Reserving Decision, Dated August 17, 1988

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

80 CV
6761 SAND SDNY

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August, one thousand nine hundred and eighty-eight.

Present: HONORABLE JON O. NEWMAN,
HONORABLE ROGER J. MINER,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

and

YONKERS BRANCH N.A.A.C.P., ET AL.,

Plaintiffs-Intervenors

v.

YONKERS BOARD OF EDUCATION, ET AL.,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
AUGUST 17, 1988
ELAINE GOLDSMITH,
CLERK SECOND
CIRCUIT

Docket Nos.
88-6178,
88-6184,
88-6188,
88-6190.

It is hereby ordered that the motion to extend the stay of contempt sanctions be and it hereby is granted until further order of the court.

The request to stay the District Court's order of July 26, 1988 is taken under advisement; the court reserves decision on the merits of the appeal.

Elaine B. Goldsmith, Clerk
BY

/s/
Edward J. Guardaro,
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH

/s/
Clerk

Order of the United States Supreme Court on Motions for Stay with Dissenting Opinion, Dated September 1, 1988

SUPREME COURT OF THE UNITED STATES

Nos. A-172, A-173, A-174, and A-175

A-172 HENRY G. SPALLONE
v.
UNITED STATES ET AL.

A-173 NICHOLAS LONGO and EDWARD FAGAN
v.
UNITED STATES ET AL.

A-174 PETER CHEMA
v.
UNITED STATES ET AL.

A-175 CITY OF YONKERS
v.
UNITED STATES ET AL.

On Applications for Stay
(September 1, 1988)

The applications for stay of Henry G. Spallone, Nicholas Longo, Edward Fagan, and Peter Chema presented to JUSTICE MARSHALL and by him referred to the Court are granted pending the timely filing and disposition by this Court of petitions for writs of certiorari.

The application for stay of the City of Yonkers presented to JUSTICE MARSHALL and by him referred to the Court is denied.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, concurring in the denial of stay in A-175, dissenting from the grant of stay in A-172, A-173, and A-174.

On August 26, 1988, the Court of Appeals for the Second Circuit upheld both the District Court's determination that the City of Yonkers and four members of its City Council were in contempt of court and its imposition of sanctions for their failure to abide by a consent decree committing the City to implement a housing desegregation plan. The Court of

Appeals stayed issuance of its mandate until September 2, to permit application for a stay of the contempt sanctions pending filing and consideration of petitions for writs of certiorari. The City of Yonkers and the four council members have sought such a stay. Today the Court denies a stay as to the City but grants it as to the four councilmembers. I believe that the Court should deny the stay as to the councilmembers as well.

I

In 1980, the United States filed suit against the City of Yonkers, claiming it had intentionally perpetuated and aggravated residential racial segregation in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601-3619 (1982), and had intentionally segregated its schools in violation of the Constitution. The National Association for the Advancement of Colored People (NAACP) was accorded plaintiff-intervenor status. In 1985, the District Court held the City liable for intentional housing and school segregation, *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D.N.Y. 1985), finding *inter alia* that the City had deliberately concentrated virtually all of its public and subsidized housing in southwest Yonkers in order to maintain residential segregation. The District Court issued a Housing Remedy Order which directed the City to establish a fair housing policy, to construct 200 units of public housing and to plan additional units of subsidized housing. The Court of Appeals for the Second Circuit affirmed both the liability and remedy rulings, *United States v. Yonkers Board of Education*, 837 F. 2d 1181 (2d Cir. 1987), and the Court denied the City's petition for a writ of *certiorari*. 108 S. Ct. 2821 (1988).

On November 15, 1986, the City informed the District Court that it would not comply with the Housing Remedy Order. The United States and the NAACP moved for an adjudication of civil contempt and the imposition of coercive sanctions, but the District Court instead sought voluntary compliance with its earlier order. After negotiations, the City Council--the City's sole governing authority--agreed to appoint an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for subsidized housing. Over a year passed. On January 28, 1988, the parties entered into a consent decree, approved by the District

Court, which set a new timetable for the construction of the 200 public housing units. The City pledged that it would not seek further review of the Housing Remedy Order or any subsequently entered decree relating to these 200 units. In addition, the City agreed that the construction of 800 units of subsidized housing was an appropriate remedy and pledged to make good-faith efforts to build the additional 600 units within the next three years. Section 17 of the consent decree obligated the City "to adopt . . . legislation" necessary to meet the goal of 800 units, including tax abatements, zoning changes, and, within ninety days, a package of incentives for local development. Section 18 provided for further negotiations and the submission of a draft of a second consent decree setting forth long-range plans for subsidized housing by February 15, 1988. The Council approved the consent decree by a vote of 5 to 2.

Within two months, the City demonstrated its unwillingness to comply with the consent decree by moving unsuccessfully to delete the provision in which it promised not to seek further review of its obligation to build the 200 units, and by offering to return approximately $80 million in federal funds in the event this Court set aside the public housing provisions of the Housing Remedy Order. On April 12, 1988, the City announced that it was "not interested" in completing negotiations on the long-term plan for subsidized housing as required by section 18 of the consent decree. Following a hearing on June 13, the District Court entered a Long Term Plan Order outlining the legislation that the City had committed itself to adopt in section 17 of the consent decree. The order was based on a draft prepared by the City's lawyers during earlier negotiations and accommodated most of the City's objections.

The next day, June 14, 1988, the Council adopted a resolution declaring a moratorium on all public housing construction in Yonkers. A week later, on June 21, the City announced that it had retained a consulting firm to draft housing legislation, and that the next Council meeting was tentatively scheduled for August. The District Court, expressing concern about delay, asked the Council to pass a resolution adopting the provisions of the Long Term Plan Order. On June 28, the Council voted down a resolution

indicating its commitment to implementing the Housing Remedy Order, the consent decree, and the Long Term Plan Order. The following day, the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable on penalty of a contempt adjudication and imposition of fines. At a hearing held to consider the proposed order, the City stated that it would not voluntarily comply with the Long Term Plan Order and urged the Court to enter an order adopting the necessary legislation. The City also objected to the creation of an Affordable Housing Commission to exercise the Council's responsibilities for implementing the District Court's orders and the consent decree. The City argued that such a Commission would impermissibly interfere with the Council's "core legislative and executive functions."

On July 26, 1988, the District Court ordered the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [consent decree] and the Long Term Plan Order." This "legislative package" was set forth in a detailed Affordable Housing Ordinance drafted by the City's consultants. The July 26 order warned that if the legislation were not adopted by August 1, the City and the councilmembers would face contempt adjudication and the following fines: on the City, a fine starting at $100 on August 1 and doubling every day until the legislation was passed, so that the cumulative total of the fines would exceed $10,000 by day 7, $1 million by day 14, $200 million by day 21 and $26 billion by day 28; on the councilmembers, a fine of $500 per day on each member who voted against the legislative package, with the additional threat of incarceration on August 10 if the package were not adopted by the Council by that time. To accommodate the City's expressed concern that it could not adopt legislation by August 1 without running afoul of state notice and hearing requirements, the District Court specified that its July 26 order would be "satisfied if the City Council, on or before August 1, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." On August 1, the Council rejected such a resolution by a vote of four to three.

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and councilmembers an opportunity to show cause why they should not be adjudicated in civil contempt. As for the City, the District Court "rejected [its, contention that a dichotomy can be drawn between the City and the council through which it acts." Further, the District Court declined to adopt the Affordable Housing Ordinance for the City, as requested by the City, noting that the City should directly meet its responsibilities under the Constitution and the consent decree. As for the four councilmembers who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, the District Court rejected their request for a continuance, observing that they had been on notice since July 26 of the prospect of contempt and the need for counsel, and that they had rejected the court's offer of an immediate evidentiary hearing. The District Court agreed nonetheless that it would permit argument at a later date on any theory or circumstance not then available to counsel. The District Court held the City and the councilmembers in contempt and imposed the sanctions set forth in the July 26 order.

On August 9, the Court of Appeals stayed the District Court's contempt sanctions against the City and the four council members pending appeal. On August 26, the Court of Appeals, in a unanimous opinion by Judge Newman, affirmed the District Court's contempt orders and the imposition of coercive monetary sanctions, with one modification in the City's sanctions. First addressing the claims of the councilmembers, the Court of Appeals found that the procedural due process requirements attendant to the contempt adjudications were, with one exception, fully observed. The July 26 order provided sufficient notice to councilmembers of the consequences of noncompliance. Each member appeared with counsel and had an opportunity to present evidence and legal argument. Although the Court of Appeals found that it would have been preferable to have accorded counsel a few days to prepare, it declined to remand the matter given the absence of factual disputes and its decision on the merits. The Court of Appeals also rejected the councilmembers' First Amendment argument, stating that the public interest in obtaining compliance with federal court judgments that remedy

constitutional violations justifies whatever burden there may have been on the councilmembers' free expression rights.

As for the argument that the councilmembers were entitled to some form of legislative immunity, the Court of Appeals noted that, even if such immunity extends to individuals performing legislative functions at the purely local level, it would not bar District Court court orders requiring compliance with decrees redressing constitutional violations. The Court of Appeals stressed, however, that it was not necessary to answer the broad question whether a District court could order local legislators to vote in favor of a particular ordinance to redress a constitutional violation, because the Council had approved, and the City had signed, a consent decree requiring the enactment of legislation necessary to implement the District Court's earlier order. The Court of Appeals found that all councilmembers, including those who had voted against the consent decree, were obligated to enforce it, and that their failure to do so made appropriate contempt adjudications and the imposition of sanctions.

Along these same lines, the Court of Appeals also decided that the District Court did not abuse its discretion in directing the Council to adopt the Affordable Housing Ordinance, and in imposing coercive contempt sanctions to compel compliance, given that the City had agreed in the consent decree to adopt necessary implementing legislation. As for the claim that the July 26 order compelled the Council to violate state notice and hearing requirements, the Court of Appeals stressed the supremacy of federal court orders in implementing remedies for constitutional violations. The Court of Appeals added that, in any event, the Council could have satisfied the July 26 order by passing a resolution committing itself to enact the legislation in accordance with state law procedures. As for the City's claims, the Court of Appeals rejected the defense of impossibility, noting that the City had not done everything it could under city law to obtain compliance with the orders of the District Court. In particular, the City had not tried to coerce council members into compliance by applying to the Emergency Financial Control Board to take action with respect to the City's financial affairs, or by requesting the Governor of New York to remove the recalcitrant councilmembers for misconduct. In any event, the

Court of Appeals concluded, "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." The Court of Appeals noted in this regard that the City has no separate executive authority in that its mayor merely serves on the Council, and that the city manager serves at the pleasure of the Council.

Finally, as to the amount of the coercive fines, the Court of Appeals found that the Excessive Fines Clause of the Eighth Amendment does not apply to civil contempt sanctions imposed to obtain compliance with court orders. Although the court noted that the Due Process Clause of the Fifth Amendment arguably provides a limit, it relied on an abuse of discretion standard to review the amount of the fines. The Court of Appeals held that the District court acted within its discretion in imposing cumulative fines and in starting the fine schedule at $100 a day, but it modified the schedule so that the fine would be $1 million on day 15 and $1 million for every subsequent day of noncompliance. Given the City's annual budget of $887 million, the Court of Appeals found that a $1 million a day fine was within "reasonable limits."

II

The City argues that the fines imposed by the District Court violate the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment; that the Court of Appeals erred in affirming the contempt adjudication because the District Court did not adopt less restrictive alternatives; that the City had a valid impossibility defense; and that the order violated state law. Councilmembers Spallone and Chema claim legislative immunity. Chema also argues that the contempt sanction violates the First Amendment and his procedural due process rights. Councilmembers Longo and Fagan claim generally that the sanction was an abuse of discretion and unconstitutional.

A. *The City*

The City's first contention is that the Excessive Fines Clause of the Eighth Amendment is applicable to contempt sanctions and that the particular sanctions imposed here were constitutionally excessive. The City accurately observes in this

regard that the Court has indicated that the applicability of this Clause to punitive damages in civil cases is "a question of some moment and difficulty." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988). But, even if the Clause applies to punitive damages, the City offers no compelling reason why we should extend its reach to civil contempt sanctions. Indeed, it appears settled that the Cruel and Unusual Punishment Clause does not apply to civil contempt sanctions. *See Ingraham v. Wright*, 480 U.S. 651, 668 (1977). This is not surprising since the Cruel and Unusual Punishment Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees. *See ibid.*; *Uphaus v. Wyman*, 860 U.S. 72, 81 (1959). In any event, even assuming that the size of monetary contempt sanctions is limited by the Excessive Fines Clause or even the Due Process Clause, I do not think that the fines against the City, as modified by the Court of Appeals, are unreasonable. The City of Yonkers has an annual budget of $337 million. At one point, it offered to forfeit $30 million in federal funds to avoid compliance with the consent decree. Under these circumstances, a fine schedule which imposes $1 million a day only after noncompliance for fifteen consecutive days can hardly be deemed unreasonable.

The City's second contention is that the contempt adjudication itself was improper because the District Court should have adopted less restrictive alternatives such as direct enactment of the legislation or appointment of an Affordable Housing Commission, and because the City had a valid impossibility defense. Neither contention has merit. First, the District Court had no need to resort to its equitable authority, codified in Fed. R. Civ. P. 70, to deem the legislation enacted, as the City had committed itself to adopting that legislation in a court-approved consent order. Surely it is both less disruptive and more effective to order compliance with that order than to usurp completely the Council's legislative authority and enact the legislation directly. Second, having previously objected to the creation of an Affordable Housing Commission, the City cannot now claim that the District Court should have created such an entity. The City also contends the District Court erred by rejecting its impossibility defense. It claims that it does not have the ability to compel the councilmembers to enact the

legislation or to remove recalcitrant members. The City's attempt to divorce itself from the actions of its councilmembers is disingenuous. As the City repeatedly points out in its application, "Yonkers is relatively unique in that most of the governmental power in the City is centralized in the legislative branch." For this reason, the City *is* the Council. Indeed, because the Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986), it is reasonable to attribute to the City the acts of its elected policymakers.

B. *The Councilmembers*

The councilmembers' primary argument is that a federal court lacks authority to order an individual local legislator, as opposed to the body in which he serves, to enact specific legislation. In the councilmembers' view, a federal court, by entering such an order, runs roughshod over what they see as the local legislator's right to be absolutely free from such restraints. While this issue arguably is of substantial interest, this case is not a proper vehicle for addressing it. In the first place, the broad question raised by the councilmembers is not presented by these facts. As the Court of Appeals stressed below, this is not a case where a federal court enjoined local legislators to vote in favor of a particular bill in order to remedy a constitutional violation. Far from that, this case presents the much more narrow question whether a federal court may order local officials to abide by an explicit obligation--here, a promise to enact legislation--contained in a consent decree that the officials voted to adopt and that the District Court agreed to accept. In short, this case is about a District Court's ability to enforce its consent decrees. In no way did the Court of Appeals even hint that federal courts possess the broad powers over local legislators that the councilmembers claim that the Court of Appeals arrogated to itself and the District court.

In any event, it is not at all clear that federal courts lack authority in all circumstances to enter orders affecting a local legislator's performance of his legislative duties. In *Milliken v. Bradley*, 433 U.S. 267 (1977), the Court held that a District Court could order local school authorities to implement certain programs designed to ameliorate the effects of prior segregation policies. As a practical matter, the import of the Court's decision was that the individual members of the local

school authority were required to vote a certain way for specific remedial programs. This necessary effect of a remedial order is highlighted by the Court's earlier decision in *Griffin v. County School Board*, 377 U.S. 218 (1964). There, the Court noted that a District Court possessed authority to order county supervisors "to exercise the power that is theirs to levy taxes" in order to reopen public schools that had been closed in an attempt to avoid a prior desegregation order. As in this case, the individual local officials in *Griffin* openly flouted clear commands of a District Court.

Although cases like *Milliken* and *Griffin* may stand for the proposition that the District Courts may enjoin local legislators to take certain affirmative steps in order to remedy constitutional violations, the Court has never squarely addressed the question whether these local legislators are entitled to some form of legislative immunity. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the Court specifically left open the question whether local legislators are entitled to any immunity. (Earlier, in *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), state legislators were afforded absolute immunity for activities within "the sphere of legitimate legislative activity"; *Lake Country* extended such immunity to "regional legislators.") Since *Lake Country* issued, seven Courts of Appeals have held that local legislators are entitled to absolute legislative immunity. None of these cases, however, involved situations where the District Court sought to compel certain behavior to redress constitutional violations, let alone situations where the District Court merely sought to enforce a consent decree. Instead, the cases typically involved private-party damage actions against individual members of local governing boards. It would seem sensible to allow the lower courts to be the first to resolve the question whether legislative immunity protects local officials against the imposition of contempt sanctions for noncompliance with a consent decree imposing legislative obligations.

Even assuming that this question warrants the Court's immediate attention, the instant case contains a factual peculiarity that makes it unsuitable for review. The City stresses its "extraordinary" system of governance, in which the Council exercises both legislative *and* executive powers. This

necessarily complicates any legislative immunity analysis, particularly if one believes that the Council exercised its *executive* prerogatives by not complying with the consent decree, and by not abiding by the July 26, 1988 order. Before the Court takes up the issue of local legislative immunity, it should wait for a case in which the legislative body is exercising *only* legislative powers.

Finally, the First Amendment and procedural due process claims strike me as totally meritless for the reasons articulated in the Court of Appeals' opinion. In any event, they involve the application of settled law to a particular set of facts.

III

In my view, the claims presented by the City and the four councilmembers do not merit review by the Court. I therefore vote to deny the applications for stay.

Minutes of District Court Proceedings (Sand, J., September 2, 1988)

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

September 2, 1988
2:05 p.m.

THE COURT: As I suppose we are by now all aware, at approximately 11:55 last evening the Supreme Court denied the application for stay of the city of Yonkers and granted the application for stay of the four individual city councilmen, pending the timely filing and disposition of petitions for writs of certiorari.

At 12:36 p.m. today, the Court of Appeals for the Second Circuit issued its mandate and order. If I am correct in believing that that has not been made available to counsel, I will read the crucial paragraph of that order. This is the Court of Appeals for the Second Circuit. The order is signed by Judges Newman, Miner and Mahoney. After reciting the procedural history and the action of the Supreme Court, the order provides:

"Our opinion of August 6, 1988, adjudicating appeals by the city and the council members from the (2) district court orders of August 2 imposing civil contempt sanctions, had directed that the mandate of our court would issue on September 2 unless stayed by the Supreme Court. The Supreme Court has not stayed the issuance of our mandate and accordingly we direct that the mandate issue forthwith, thereby removing any question as to the jurisdiction of the district court. However, in light of the Supreme Court's orders of September 1 with respect to the four council members, we direct the district court to stay the execution and enforcement of the mandate of this court, insofar as that mandate directs action to be taken with respect to council members Spallone, Chema, Fagan and Longo."

The order continues:

"The result is that the daily fines against the city of Yonkers imposed by the district court in its order of August 2, as modified by our opinion of August 26, resume as of today, and the daily fines and impending incarceration imposed upon council members Spallone, Chema, Fagan and Longo are stayed pending the timely filing and disposition by the Supreme Court of petitions for certiorari in accordance with the Supreme Court's order of September 1."

The status therefore is quite clear: Pursuant to the opinions of the Court of Appeals, the Supreme Court and the order and mandate of the Court of Appeals which I have just read, the daily fines imposed upon the city of Yonkers (3) resume as of today and double daily through September 9, at which time they will reach their maximum level of $1 million per day. The consequences of that is, Monday being an official court holiday, the fine payable on Tuesday, September 6, will be in the amount of $192,000, being the total of the following daily fines: today, Friday, the eighth day, the fine schedule is $12,800; Saturday, day nine, $25,600; Sunday, day 10, $51,200; Monday, day 11, $102,400—a total of $192,000 payable on Tuesday.

As previously discussed, the court will sign two orders which had been submitted to it, the signing of which had been held in abeyance because of questions which had been raised, properly

raised, concerning this court's jurisdiction. The Second Circuit has now made crystal clear that this court now has jurisdiction over the matter.

The two orders which I am signing now relate to the funding of the Board of Education and with respect to the obligations to the bondholders. They are in the form discussed at our last conference. I am giving them to the clerk now, with the direction that they be filed and docketed forthwith.

Pursuant to the order relating to the Department of Education funding then, the $192,000 will be payable in two checks, one in the amount of $106,752, which will be treated in the manner provided in the court's order of July (4) 26, and the second check in the amount of $85,248, which will be held in the manner provided in the order just signed, dealing with the funding of the Board of Education.

Does anybody have any questions or any doubts with respect to any of the arithmetic or any of the matters which I have just stated?

On July 26, this court had before it two proposals. The proposal which was adopted and which is embodied in the July 26 order is one which we referred to as classic contempt. That is the garden variety treatment for contempt of an order of a court by means of fines and potential incarceration.

This court also made reference at that time to another proposal, the creation of a Yonkers affordable housing commission, and indeed the court had made available to the parties for their consideration and comment a draft of such a proposal. The NAACP thereafter also submitted a proposal relating to a commission.

When the matter was brought before this court, the city of Yonkers opposed the concept of a commission, although it appears from the opinion of the Court of Appeals and the opinion of Justice Marshall, who together with Justice Brennan dissented from the grant of the stay, that at the appellate level the city took the position that the commission route was a viable alternative to the classic (5) contempt route.

In promulgating the July 26 classic contempt order, this court advised the parties that it did not regard the two pro-

posals as being mutually exclusive, but rather that they should be regarded as possibly sequential steps to be taken.

What we said in part, at page 10 of the transcript of July 26, is if this, that is, the fine route, goes on for a period of time, "we are not just going to permit everything in Yonkers to go down the drain, because there is still one thing which is available to us, and that is, of course, the commission route."

The action taken by the Supreme Court late yesterday evening does not in any way alleviate—indeed one might argue it intensifies—the fiscal crisis which confronts the city of Yonkers. Although the four city councilmen have been granted a respite as to the sanctions which may be visited upon them personally, they of course still have a responsibility to the citizens they represent, who will bear the brunt of these fines, which, as I have already noted, will reach the level of $1 million a day in one week, the imposition and collection of which is the result not only of action by this court but the unanimous action of the judges of the Court of Appeals for the Second Circuit and of the Supreme Court of the United States.

(6) We will meet immediately after these proceedings with counsel for the parties, to explore with them informally some thoughts that we have with respect to possible solutions of this crisis and to hear from them any thoughts that they may have on that subject.

It should be clear that the first step that must be taken is compliance with the law.

Unless there is something else that anyone wishes to say, we will adjourn these proceedings and I will confer with counsel in the jury room.

MR. SUSSMAN: One matter, your Honor. Miss Hill, the new executive director of the office of implementation, did contact me a few days ago regarding the preparation of an order preserving the integrity budgetarily of her operation. Unfortunately, I have not yet had an opportunity to prepare the order. I will have it to the court on Tuesday. I apologize to the court.

MR. MERCAROLA: Counsel to Councilman Spallone. May I inquire whether a stay would be necessary with regard to the stay of contempt with regard to Councilman Spallone?

THE COURT: No. I think the orders of the Supreme Court and the mandate and order of the Second Circuit which I have just read are self-executing. No further document is needed for that purpose.

MR. MARCAROLA: Your Honor, then, with regard to (7) your invitation to meet with you, that would extend only to the parties and not to the councilmen?

THE COURT: Do you wish to be present?

MR. MERCAROLA: No.

THE COURT: I am not directing that you be present. If you do not wish to be present, you need not attend.

MR. MERCAROLA: This is new. May I consult with my client?

THE COURT: Certainly.

Mr. Sculnick.

MR. SCULNICK: Your Honor, on behalf of the city and in anticipation of the invitation you have just extended to all parties to discuss the crisis facing the city, I would move on the city's behalf that the court enter a stay of the fines as against the city during the period of time that we seek to resolve the matter through negotiations.

THE COURT: Application denied.

Let me say this, and it was one of the reasons I did all of the arithmetic and the timetable: If between now and Tuesday, when the $192,000 is due and payable, I am satisfied that we have reached a point which makes it appropriate that the fines be suspended or the payment stayed, you may renew that application, but not until that time, and certainly not until a time when there is a binding (8) commitment to comply with the orders of the court.

We are adjourned then *sine die*.

Yonkers Resolution No. 13-1988 Adopting Fair Housing Ordinance

GENERAL ORDINANCE NO. 13-1988

BY MAYOR WASICSKO

A GENERAL ORDINANCE AMENDING G.O.#24-1968, (COMMONLY KNOWN AS THE ZONING ORDINANCE OF THE CITY OF YONKERS) AND ADDING A NEW ARTICLE XV ENTITLED "AFFORDABLE HOUSING ORDINANCE OF THE CITY OF YONKERS".

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 to 2

VICE MAYOR SPALLONE AND COUNCILMEMBER FAGAN VOTING NO.

RESOLUTION NO. 193-1988

BY MAYOR WASICSKO, MINORITY LEADER LONGO, COUNCILMEMBER CHEMA

WHEREAS, on January 20, 1988, a Consent Decree providing for the construction of 200 public housing units was entered into between the Plaintiffs and the City of Yonkers; and

WHEREAS, the attorney for the Plaintiff-Intervenor and the class and the officials of the City administration have tentatively agreed on a new and improved public housing distribution plan;

NOW, THEREFORE, BE IT RESOLVED, that the consensus of the City Council is that the two hundred units of public housing provided for in the Consent Decree shall be divided equally between stand alone townhouse units and units blended with market rate and affordable housing units; and

BE IT FURTHER RESOLVED, that it is the consensus of the City Council that no public housing units should be constructed on the St. Joseph Seminary site, thus ending the litigation between the City and the Roman Catholic Archdiocese of New York; and

BE IT FURTHER RESOLVED, that all of the public housing units which are not blended with affordable housing units and market rate housing units will be managed by a non-profit organization on which will be represented a member of the clergy in the neighborhood in which the housing site is located and a member of the class; and

BE IT FURTHER RESOLVED, that it is the consensus of the City Council that in order to improve public housing in Yonkers it will retain within thirty days of approval by the Court of modifications to the Consent Decree, a consultant who will study the management of existing public housing projects, which consultant will be asked to make recommendations with respect to the management of such public housing projects. The City administration will appoint a three-person committee, including a representative of the class to study such recommendations and the practicability of implementing such recommendations.

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 to 2 SPALLONE AND FAGAN VOTING NO.

RESOLUTION NO.194-1988 BY MAYOR WASICSKO, MINORITY LEADER LONGO.

COUNCILMEMBER CHEMA:

WHEREAS, the City Council intends to pass the Affordable Housing Ordinance as directed by Judge Leonard B. Sand in his Order of July 26, 1988; and

[WHEREAS, the administration of the City of Yonkers has reached] tentative agreement with the attorneys for the intervenor-plaintiff and the class upon what we believe to be amendments to the Affordable Housing Ordinance which will result in improvements to the Affordable Housing Plan for the City of Yonkers; and

WHEREAS, we intend to submit to the United States District Court this improved Affordable Housing Plan; and

WHEREAS, such plan would require additional amendments and changes to the Affordable Housing Ordinance we pass tonight;

NOW, BE IT RESOLVED, that the Council intends with the permission and consent of the Court to amend the Affordable Housing Ordinance to effect the aforesaid improvements and to insure that the affordable housing units to be constructed shall not be inconsistent with the current character of the neighborhood in which they are to be built, and to insure that the City Council retains control over the construction of such affordable housing units.

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 to 2 SPALLONE AND FAGAN VOTING NO.

Affordable Housing Ordinance of the City of Yonkers, Dated September 9, 1988

AGENDA

CITY COUNCIL OF THE CITY OF YONKERS

STATED MEETING

FRIDAY, SEPTEMBER 9, 1988

GENERAL ORDINANCE

G.O. NO. 13-1988

BY MAYOR WASICSKO

NO. 1

A GENERAL ORDINANCE AMENDING G.O.#24-1968, (COMMONLY KNOWN AS THE ZONING ORDINANCE OF THE CITY OF YONKERS) AND ADDING A NEW ARTICLE XV ENTITLED "AFFORDABLE HOUSING ORDINANCE OF THE CITY OF YONKERS."

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 TO 2.

VICE MAYOR SPALLONE AND COUNCILMEMBER FAGAN VOTING NO.

Article I - General

1. Title

This Chapter shall be known as the "Affordable Housing Ordinance" of the City of Yonkers.

2. Declaration of Purpose

This Affordable Housing Ordinance is adopted to comply with the Long Term Housing Plan Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch - NAACP et. al. v. Yonkers Board of Education, et. al.*, and in furtherance of the following related and more specific purposes:

a. To implement a program whereby all new multi-family housing developments in East and Northwest Yonkers will be required to provide assisted housing units not to exceed 20% of the maximum aggregate number of units authorized for construction in exchange for a variety of zoning and other mandated incentives as set forth in Section 8 of the Long Term Housing Plan.*1*

---

1 The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

- Increase the maximum permitted Height of a Building.
- Increase the maximum permitted Floor Area Ratio of a Building.
- Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor area ratios for mixed use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.
- Reduce the minimum permitted Lot Width or Lot Area for apartment houses.
- Reduce the minimum permitted Lot Area per family.
- Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

(Footnote Continued)

b. To provide for the construction of housing units for rental or sale that will be affordable to

---

- Grant the owner of multi-family rental housing a full tax abatement on city real estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development, including both assisted and non assisted units.
- Vary the extent and/or duration of tax abatement depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group as described herein.
- Grant a tax abatement on City real estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.
- Vary the extent and/or duration of the tax abatement granted to households buying assisted units, depending on the household's income level.
- Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.
- Cause funds in the Affordable Housing Trust Fund (AHTF) to be applied (subject to HUD regulations) to site preparation or improvement at a site to be sued for the construction of assisted units.
- Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.
- Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.
- Vary the extent of assisted financing from the Industrial Development Authority depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group as described herein.

households earning between 50% and 120% of the New York Metropolitan Area median income.

c. To provide for changes in existing zoning requirements and increases in land use densities so as to facilitate construction of multi-family residential buildings containing a mix of market rate and assisted units.

d. To provide for a variety in the size of assisted units.

e. To specifically target the areas of East and Northwest Yonkers for the development of assisted housing.

f. To promote the provision of assisted housing in a dispersed manner so as to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers.

g. To provide measures to ensure that assisted housing units remain affordable for specified periods of time as required by the Long Term Housing Plan.

h. To foster to the extent possible the use of such architectural and design devices as will minimize the visual impact of such inclusionary housing developments on the surrounding community and any distinction between assisted and market-rate units.

3. Effectiveness of Ordinance

This ordinance shall be in effect from the date ofenactment to such time as the goal of 800 assisted units have been produced in accordance with Section 15 of the First Remedial Consent Decree in Equity entered by the United States District Court for the Southern District of New York on January 28, 1988.

Article II - Definitions

4. Definition of Terms

As used in this chapter, the following terms shall have the meaning indicated:

ASSISTED UNIT - a dwelling unit which has been made affordable to a specified income group as defined herein, and for which affordability controls as defined in Article V shall apply.

DWELLING UNIT - a room or group of rooms intended for occupancy as separate living quarters, with cooking, sleeping and sanitary facilities for the exclusive use of a single household.

FIRST REMEDIAL CONSENT DEGREE IN EQUITY - order entered on January 28, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch - NAACP et. al. v. Yonkers Board of Education, et. al.*, which sets forth certain agreements of the parties to that litigation, and certain actions which the City of Yonkers is required to take in connection with the consensual implementation of Parts IV and VI of the Housing Remedy Order.

HOUSING REMEDY ORDER - order entered on May 26, 1986 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch - NAACP et. al. v Yonkers Board of Education, et. al.*

INCLUSIONARY DEVELOPMENT - a multi--family housing project in which a proportion of the dwelling units are assisted units.

LONG TERM HOUSING PLAN - Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch - NAACP et. al.*

v Yonkers Board of Education, et. al., which set forth certain actions to be taken by the City of Yonkers required by Section VI of the Court's May 26, 1986 Housing Remedy Order.

MULTIFAMILY DEVELOPMENT - one or more residential buildings, each containing three or more attached dwelling units. Multifamily developments shall include, but are not limited to, townhouses, garden apartments, flats, mid-rise apartment buildings, and high rise apartment buildings.

OFFICE OF IMPLEMENTATION - Office created by the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch - NAACP et. al. v. Yonkers Board of Education, et. al.* to monitor and insure implementation of the Housing Remedy Order, with responsibilties and functions as enumerated therein and as set forth as follows:

- To work with developers in determining the incentives they require to provide assisted units at the sale or rental levels set by this ordinance based on an examination of project costs, projected sales or rental receipts, pro formas, etc.

- To ensure that construction of the assisted units is taking place according to the phasing schedule set forth in this ordinance, and that market rate units are not being occupied in advance of the schedule.

- To review and approve proposed sales prices and rent levels of assisted units and to ensure that the actual sales prices and rentals advertised are consistent with the standards of this ordinance and alternatively, to determine the sales prices and rentals to be applied.

- To review, and act upon, requests by developers for changes in sales prices or rent levels of assisted units, resulting from changes in income levels, mortgage interest rates, etc.

- To review and approve the proposed marketing plans for assisted units and to ensure that marketing provisions of this ordinance are fully and effectively carried out.

- To review and approve of procedures to be used in the screening of prospective tenants or buyers of assisted units to ensure that only households meeting the prescribed income qualifications are processed for occupancy of the assisted units.

- To ensure that closing or other ancillary costs for assisted units are consistent with this ordinance.

- To review and approve selection priorities for assisted units and to ensure that the established priorities in selection of tenants or buyers of assisted units are respected.

Article III - Districts; Applicability

5. Districts; Provisional Districts; Boundary Locations

a. Districts

This ordinance constitutes an overlay district to the M, MG, B, A and BA zones and such other zones in which multifamily housing is or may be permitted in East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use. This ordinance shall apply to multifamily housing, including projects (whether or not presently in the planning stage) which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction, as of the date of this ordinance.

In addition, the Long Term Housing Plan Order specifically permits developers to apply for zoning changes to build multifamily inclusionary developments in any district in East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein.

b. Provisional Districts. A developer may propose to build a multifamily inclusionary development in the M, MG, B, A and BA zones in areas other than East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use; however nothing contained herein shall require developers in such areas to build multifamily inclusionary developments. Developers may also apply for zoning changes to build multifamily inclusionary developments in areas other than East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein so as to make the provision of assisted housing units economically feasible.

The City shall have the option of granting the incentives enumerated and referred to herein to facilitate the provision of multifamily inclusionary development in areas other than East and Northwest Yonkers. These incentives may be made available for construction of up to 400 assisted units in such areas, for which the City shall be credited (toward its goal of 800 assisted units as set forth in Article I, Section 3 of this ordinance), with one unit of assisted housing for every two assisted housing units constructed up to a maximum credit of 200 units.

c. Boundary Locations. For purposes of this ordinance "Northwest and East Yonkers" shall include all land in Yonkers north and east of the area bounded by: Glenwood Avenue extending east from the Hudson River to Father Finian Sullivan Drive; Father Finian Sullivan Drive north to Lake Avenue; Lake Avenue east to Saw Mill River Road; Saw Mill River Road south to Ashburton Avenue; Ashburton Avenue east and south to the Saw Mill River Parkway; and the Saw Mill River Parkway to the City of Yonkers municipal boundary with the City of New York.

6. Required Number and Distribution of Assisted Units in Inclusionary Developments.

a. Multifamily housing development shall be inclusionary developments containing a set-aside of assisted units equal to 20 percent of the maximum aggregate number of units authorized for construction in such developments, except as provided in paragraphs b and c.

b. In multifamily inclusionary developments in the A and BA zones, and in such other zones which presently permit a density of sixty (60) units per acre or more, the required set-aside of assisted units may be reduced, but no less than 10% of the maximum aggregate number of units authorized for construction in such development shall be set aside as assisted units ___ provided that the maximum density bonus that will then be given to the developer shall not be in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of the 50 percent over the permitted zoning, the 20 percent set-aside shall apply.

c. Notwithstanding paragraphs (a) and (b), the City may exempt any multifamily housing development of fewer than ten units from inclusionary development; provided, however, that such exemption shall not be applied to circumvent the set-aside requirements set forth in paragraphs a and b of this section.

7. Income Distribution.

a. Multifamily inclusionary development shall be required to include an income distribution for assisted units to ensure that:

(1) 1/8 of the total number of assisted units be provided on terms affordable to families earning

no more than 50% of the median income in the New York Metropolitan Area;

(2) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 80% of the median income in such Area;

(3) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 100% of the median income in such area; and

(4) 1/8 of the total number of assisted units be provided on terms affordable to families earning no more than 120% of the median income in such area.

Provided, however, that a developer may propose to modify the income distribution of assisted units set forth above subject to approval by the City.

b. Notwithstanding paragraph (a) of this section, if the aggregate minimum number of assisted units to be allocated to any of the four income groups is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

8. Bedroom Distribution. Multifamily Inclusionary Development shall provide the following bedroom distribution for the assisted units:

(a) the number of two-bedrooms assisted units shall equal at least 60% of the total number of assisted units;

(b) the number of three-bedroom (or larger) assisted units shall equal at least 30% of the total number of assisted units;

(c) the number of one-bedroom assisted units may not exceed 10% of the total number of assisted units.

9. Affordability Criteria

a. Definition

The term "affordable", as used in this ordinance shall mean with respect to each income category described in this ordinance, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, including principal and interest payments, property taxes, homeowners association fees, maintenance or carrying costs, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

b. Term; Transfer Restrictions and Occupancy Criteria

(1) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 of the First Decree and Article IV, Section 7 of this ordinance as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants, and subletting and assignments shall be prohibited.

(2) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restriction on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of the purchase, in

the same group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit.

(3) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence. All tenants in place at the time initial notice of conversion is provided who meet the income qualifications set forth in Article IV, Section 7 of this ordinance (as at that time adjusted) shall be permitted to purchase their unit at an affordable price to them as defined herein.

(4) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such

restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in this paragraph (d) shall not toll the running of the thirty-year period referred to in subparagraph 2 hereof.

(5) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(6) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority in the following order to:

a) persons who, between January 1, 1971 and the date assisted housing is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Ordinance are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

b) residents of the City of Yonkers; and

c) persons employed in the City of Yonkers.

(7) The Office of Implementation (as defined in Article II, Section 4 of this ordinance) shall be responsible

for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such prescreened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Office of Implementation shall be responsible for monitoring the good faith application of any discretion vested in such owners or developer with respect to the choice of tenants or purchasers of assisted units.

10. Architectural Integration

Developers of multifamily inclusionary developments shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate housing. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit. Developers shall be encouraged to foster, to the extent feasible. The use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

11. Staging

In all multifamily inclusionary developments, the following staging schedule shall apply for rental or sale units:

Percentage of Market Rate Units Receiving Certificates of Occupancy	Percentage of Assisted Units Receiving Certificates of Occupancy
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

Certificates of occupancy shall be issued to market rate units when the required percentage of assisted units for the respective stage has been completed.

Article V

Zoning Regulations; Incentives

12. Applicability

The zoning regulations for multifamily inclusionary developments shall allow for departures from the provisions of Table 107-7 of the City of Yonkers Zoning Ordinance.

13. Zoning Regulations

To promote the goals of this ordinance, and specifically to make the provision of assisted housing setasides feasible within inclusionary developments, the City shall offer incentives to developers of multifamily inclusionary developments which may include, but are not limited to, the following departures from underlying zoning:

a. Increase of the Maximum Permitted Height of a Building.

b. Increase of the Maximum Permitted Floor Area Ratio of a Building.

c. Change of the formulas set forth in Section 107-55 (B) of the Yonkers Zoning Ordinance for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

d. Reduction of the Minimum Permitted Lot Width or Lot Area for apartment houses.

e. Reduction of the Minimum Permitted Lot Area per Family.

f. Reduction of the Minimum Permitted Rear Yard or Minimum Permitted Front Yard.

Notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Zoning Ordinance, a particular housing development may contain units in excess of the number which would otherwise have been allowed by such Chapter.

Departures from underlying zoning regulations for multifamily inclusionary developments shall be determined based on submissions made by the developer as provided in Article VI, Section 14 of this ordinance taking into consideration such factors as, but not limited to: the provisions of the underlying zoning, including but not limited to height, bulk and density; the impact of development on surrounding land uses and neighborhoods; the allocation to specific income groups of assisted units which the developer (subject to specific provisions of this ordinance) elects to make; the degree to which assisted financing/grants of mandated incentives (as set forth in Section 8 of the Long Term Housing Plan) are available; prevailing economic and housing-market conditions; and allowance for a reasonable profit margin.

Article VI - Expedited Review; Organizational Structure

14. Expedited Review; Submission

a. Expedited Review. The City shall establish an expedited review process for multifamily inclusionary housing projects pursuant to this ordinance to include priority scheduling and expedited review and negotiation.

b. Pre-Submission Review by Office of Implementation

Developers of multifamily inclusionary projects are encouraged to seek the assistance of the Office of Implementation in preparing conceptual development plan submissions as set forth in paragraph (c) below. The Office of Implementation shall work with developers in determining the types of zoning and other incentives required to make the provision of assisted housing set-asides feasible within inclusionary developments, and is specifically empowered to make recommendations to the City as to the need for any mandated incentive not expressly set forth in Article V, Section 13 of this ordinance, including tax abatement, waiver of applications and/or processing fees for building approvals, use of Affordable Housing Trust Funds, and/or use of financial assistance from the Industrial Development Authority.

Developers of multifamily inclusionary projects intending to make application to the City for tax abatement, waiver of application and/or processing fees for building approvals, funding from the Affordable Housing Trust Fund and/or financial assistance from the Industrial Development Authority are required as part of the pre-submission review process to obtain recommendations from the Office of Implementation concerning the granting of such assistance before making application to the City

Council, as set forth below. The Office of Implementation's recommendations shall be forwarded to the Yonkers Planning Board and Yonkers City Council.

c. Submission/Development Review/Approval

(1) After having sought the assistance and recommendations of the Office of Implementation as outlined in paragraph (b) above, developers of multifamily inclusionary projects shall submit to the Yonkers Planning Board a conceptual development plan, which shall contain the following information.

(a) General location of existing and proposed structures, including the location of the assisted housing units.

(b) General type of existing and proposed uses, including a description of the proposed bedroom and income distributions, and proposed tenure structure of the assisted housing units.

(c) Conceptual rendering of the exterior design treatment of the building(s) and a typical floor plan, including a floor plan showing where the assisted units will be located.

(d) A completed Environmental Assessment Form (EAF).

(e) Existing topography and soils information, and general grading and drainage proposals.

(f) A map delineating those areas on the site comprising floodplains, wetlands, lakes, ponds, streams and other surface water bodies, and areas with slopes in excess of 15%, and a statement as to

what, if any, disturbances are contemplated in these areas, and the extent to which any mitigation measures are proposed.

(g) Existing and proposed internal streets, driveways, and points of access to existing mapped streets.

(h) Parking and loading areas, showing size and location of stalls and aisles.

(i) Landscaped areas and proposed screening.

(j) A written statement and supporting documentation indicating the traffic impacts of the project on the adjoining roadway network, and what, if any, off-site traffic improvements are proposed.

(k) A written statement and supporting documentation indicating whether any land or buildings listed on the State or National Registers of Historic Places will be altered and describing the nature of the proposed alterations.

(l) A statement and supporting documentation as to the capacities of existing water and sewer lines and related facilities, and that such water and sewer lines are adequate; if not adequate, proposed improvements that are required.

(m) A statement and supporting documentation as to the capacities of existing gas and electric lines and related facilities, and that such gas and electric lines are adequate; if not adequate,

proposed improvements that are required.

(n) Existing and proposed location and type of major signs and lighting.

(o) A written and graphic description of various aspects of the conceptual development plan, including any proposed phasing of development activities, and a statement of the applicant's interest in the land as well as evidence to support the applicant's right to make the application and use the land.

(p) A written statement indicating which, if any. Sources of municipal assistance or funding (*e.g.*, tax abatements, financing, grants) the applicant seeks to use and specifying the type of assistance, if any, that will be sought from the County, State or Federal governments.

(q) A written statement describing the types of incentives that the applicant considers necessary and sufficient to make the provision of the assisted housing set-aside economically and socially feasible, and the specific provisions of the underlying zoning from which the applicant is requesting departure as set forth in Article V, Section 13 of this Ordinance.

(r) A written statement and supporting documentation describing the reasons for the required departures from the underlying zoning, including but not limited to: a financial pro forma showing likely profit margins with and without the departures being requested.

(s) A written statement and supporting documentation indicating the manner in which the applicant intends to administer the assisted units in compliance with Article IV, Section 9 of this ordinance, including sales prices and/or rent levels for the assisted units.

(t) A written and graphic description of the area within a 400 foot radius from the property and statement and supporting documentation as to the impacts that the project will have on such area.

(u) A written statement and supporting documentation projecting the additional number of school-age children generated from both the market rate and assisted units and their impact on the existing school system. The developer shall simultaneously transmit such written statement and supporting documentation to the Yonkers Board of Education.

(2) The Planning Board through the Planning Director shall have fifteen (15) working days to request additional information from the applicant, otherwise the conceptual development plan shall be deemed complete. The Planning Board shall then have forty-five (45) working days from the date on which the conceptual development plan is deemed complete to act upon the application, otherwise the application shall be deemed approved. The building regulations contained in the conceptual plan shall be deemed permitted only in the manner stipulated by the Yonkers Planning Board in its approval. Any material or substantial amendment or amendments to the conceptual plan must be submitted to the Yonkers Planning Board for

approval in the same manner as the original plan.

(3) Upon approval of the conceptual development plan by the Yonkers Planning Board, as set forth in Subsection (2) above, the developer may elect to make application to the Yonkers City Council for any other incentives considered necessary to effectuate the multifamily inclusionary development as proposed (but not expressly set forth in Article V, Section 13 of this Ordinance), including tax abatement, waiver of application and/or processing fees for building approvals, funding from Affordable Housing Trust Funds, and/or financial assistance from the Industrial Development Authority. Upon receipt of such applications, the City Council shall have 30 days to act upon the request.

(4) Developers applying for such incentives shall submit to the Yonkers City Council the complete conceptual development as submitted to and approved by the Planning Board.

(4) Developers of multifamily inclusionary projects shall include in the application for building permits a site plan containing the following:

(a) Property lines and related street, right of-way and easement lines as determined by survey.

(b) Location of existing and/or proposed buildings and structures and uses, including the location of the assisted units.

(c) Layout of existing and proposed off-street parking areas showing the details

of aisles, driveways and each parking space.

(d) Existing topography of the site and immediately adjacent property as revealed by contours or key elevations as may be required by the City Engineer, and any proposed regrading of the site.

(e) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

(f) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

The Director of the Bureau of Housing and Buildings shall forward one (1) copy each of the site plan and accompanying documentation to the Planning Director who shall insure consistency between the site plan and the approved conceptual development plan before issuance of a building permit.

No building permits shall be issued for any such building, structure or use until the Director of the Bureau of Housing and Buildings has received a written assurance of consistency from the Planning Director, except that if said Director shall fail to report within fifteen (15) days, the proposed site plan shall be considered approved. The Planning Director's review of the site plan shall note any changes from the approved conceptual plan. The Director shall not approve any material or substantial changes to the approved conceptual plan which are not in accordance with the declaration of purpose of this ordinance; any such changes shall require approval of the Planning Board.

If the developer is required to make any material or substantial amendments to the site plan based upon the review of the Planning Director. The Director of the Bureau of Housing and Buildings shall forward again amendments to the Planning Director for re-approval prior to issuing any building permit for such amendment.

(5) If the developer does not file an application with the Director of the Bureau of Housing and Buildings and the Director of the Bureau of Housing and Buildings does not issue a building permit, within two (2) years after the Yonkers Planning Board's approval of a conceptual plan, then the zoning governing the land delineated in the conceptual plan shall be voidable by the City, so as to permit the development of other multifamily inclusionary developments in Yonkers.

Minutes of District Court Proceedings (Sand, J., September 14, 1988)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

Plaintiff,

v. 80 Civ 6761 LBS

CITY OF YONKERS, et al.,

Defendants.
----------X

September 14, 1988
10:15 a.m.

THE COURT:: Are counsel present in United States v. Yonkers?

MR. SUSSMAN: Yes, your Honor.

THE COURT: By letter dated September 12, 1988, there was forwarded to the court a copy of a resolution of the City Council of Yonkers dated September 9, 1988, adopting, without condition or qualification, general ordinance number 13-1988, commonly known as the affordable housing ordinance of the City of Yonkers. This satisfies the terms of the court's order of July 26, 1988, and Yonkers has thereby purged itself of its contempt.

As the court indicated in telephone conversations with the parties on September 9th, we were able to intercept the deposit into the United States treasury and the special account of the $819,200 paid by Yonkers on September 9th for fines incurred on September 8th. Does anyone object to the return to the City of Yonkers of the two checks totaling $819,200?

MR. HEFFERNAN: No, your Honor.

MR. SUSSMAN: No, your Honor.

THE COURT: Mr. Keneally, will you deliver to Mr. Pickelle the two checks.

The previous deposits have been deposited into the United States treasury and the special account for the board of education. The sums paid to the United States treasury are not refundable, by act of this court.

For the past several weeks this litigation has presented an issue which, as the court noted on several occasions, far transcends the City of Yonkers and far transcends the particular orders in question. At issue was the fundamental question of whether a community could refuse to comply with lawful federal court orders to implement a remedy for long-standing violations of civil rights. We hope that issue has been laid to rest and that we will no longer have to deal with a housing remedy order in terms of confrontation, court power, contempt proceedings. The hope is that we can proceed on a more constructive track.

It may be appropriate, however, to remind the parties of the second paragraph of the finding of contempt order dated August 2, 1988. That paragraph reads, "If at some later point the city purges itself of contempt and then resumes its contumacious acts, the level of fines to be imposed for such contempt shall begin at the level at which the fines had previously ceased."

Also forwarded to the court by Mr. Pickelle were two additional resolutions adopted by the city council on September 9th. One of these advises that the council "intends, with the permission and consent of the court, to amend the affordable housing ordinance." As the parties were advised on prior occasions, if the city or, indeed, if any party wishes to submit a proposed amendment to the affordable housing ordinance, it should do so in writing and promptly so that all parties can examine carefully and comment on the proposed amendment.

We do, however, want to move forward with as much speed as the circumstances will permit. This case is eight years old. There is not a single resident of Yonkers who is a member of the plaintiffs' class, that is, the class on whose

behalf the suit was brought, whose housing opportunities have in fact been increased by virtue of this litigation. I mention that fact and that concern because it is a significant factor in matters which we will continue to discuss and consider.

May we have any proposed amendment to the affordable housing plan, in writing, by close of business on Friday, September 23rd. May we have comments with respect to the proposed amendment by the close of business on September 30th.

Another resolution forwarded by Mr. Pickelle and adopted by the Yonkers city council on September 9th, resolution number 193-1988, speaks of modification of the prior orders of this court with respect to the 200 units of public housing. The court's position with respect to any such modifications has been clear and consistent. We stated on August 5th and, I believe, on at least two occasions thereafter, that the court would continue to welcome any proposals the City of Yonkers wishes to advance that would have the support of its residents and of the parties and that would provide the housing needed to remedy the long-standing civil rights violation. We will consider carefully all proposals which meet these criteria. At the same time, we will, of course, move ahead with the existing plan pursuant to the timetable previously established, unless and until that plan is modified.

The court has received a great many expressions of concern from interested parties who are fearful that this court might modify the existing housing plan, that is, the plan embodied in the previous housing remedy order and in the consent decree, without having afforded them a full opportunity to comment. There need be no such concern. For the reasons I have already referred to, that is, the long delays which have been experienced in furnishing any real relief or benefit to the plaintiff class, we will set relatively short periods of time for comments. We will set definite dates. We will not adopt any modifications without having considered the views of all the parties and consulted with our housing expert Oscar Newman.

Let me digress for a moment and comment on the role of the outside housing adviser, Mr. Newman. Let me make

clear that regardless of whatever roles he previously occupied, that is, occupied by virtue of having at one time been an expert retained by and consultant to the City of Yonkers, Mr. Newman's sole role at this time is as an adviser to the court. He will not discuss with the parties or others or with the media his views or the court's views as to any sites or any proposed modifications of the plan. His opinions will be given solely to the court, and the court will then determine whether and how those views are to be shared by the parties. I make this statement at Mr. Newman's request so that his role will be clarified and so that there be no confusion in that regard.

I have read the resolution and some of the changes which it proposes. I have a number of questions. I suppose the threshold question that I have is whether the City of Yonkers, independently or jointly with the NAACP, has reached a point in its consideration of this matter in which it is prepared to make a specific proposal for the modification of the existing plan. Has that point arrived? Is there a specific suggestion or proposal?

MR. SCULNICK: Yes, your Honor, and Mr. Sussman is handing up to the court a document which embodies the recommendations for the improvements in the public housing portion as well as the long-term housing portion of the plans. These represent agreements reached between the city and the NAACP and items to be proposed to the court for approval.

THE COURT: As is obvious, this is a document which is being handed to me now. I am seeing it for the first time. Has this been distributed to the other parties?

MR. SCULNICK: This morning.

MR. HEFFERNAN: This morning, your Honor.

THE COURT: We will mark this as Court Exhibit A. [(Court Exhibit A was marked for identification)]

MR. SUSSMAN: For one clarification on this, your Honor. It was my understanding, obviously mistaken, that the parties were going to meet with the court in chambers this

morning, and one purpose of the meeting would be to go over this document and discuss it and perhaps get it scheduled for consideration and other parties' comments. That was why we were going to present it in that fashion this morning informally to the court.

THE COURT: My understanding is, because we have spent two years and every reasonable effort should be made not to have unnecessary delays, that this represents a proposal by the City of Yonkers which has the support of a majority of the members of the City Council of Yonkers and which represents a considered recommended change on the part of the city. Is that accurate?

MR. SCULNICK: That is correct, your Honor.

THE COURT: I will meet with the parties in chambers, but I would like to make some points and raise some questions. You may choose to answer the questions in open court or you may wish to defer responding until some later date. As I indicated, we will set a timetable.

Not having had the benefit of this document but just having had the benefit of the resolution, the questions which came to mind were with respect to the type of housing to be constructed and the recommendation of stand-alone townhousing units, whether there had been prepared or was being prepared any cost analysis or identification of funding sources. With respect to the St. Joseph's Seminary site, the parties need hardly be reminded of this court's strenuous efforts in open court and in conferences in March and again in May, seeking to get the City Council to either designate an alternate site or authorize the court to do that. Does Court Exhibit A envision the substitution of a site for the St. Joseph's site?

MR. SUSSMAN: Yes, your Honor. As well as the Helena site, just so that is clear.

THE COURT: My understanding of the Austin site, apart from all other considerations with respect to that site, is that it is subject to a reversionary right on the part of the county. I will want to inquire whether there have been

obtained assurances from the county that that reverter right will be relinquished.

Because we have heard in the past several days, and welcomed hearing in the past several days, assurances of goodwill and cooperation from various sources, might I suggest that some of those assurances may be meaningfully implemented. This might be an appropriate time for the City of Yonkers to request of the county a release of its right of reverter with respect to all of the land owned by the City of Yonkers not actually used for parkland to the extent to which such land would be used for purposes of implementing the housing remedy order? That is a very real contribution that the county could make which would greatly enhance the resources and the flexibility in dealing with all aspects of the housing situation.

Two other comments, and then I will hear from the parties either in open court or in chambers if they wish.

There was reference in the resolution to the management of public housing units by a, quote, nonprofit organization on which will be represented a member of the clergy, unquote. My question is, to what extent does that require any action by the court or by HUD? Is this something which the Yonkers MHA may do on its own authority, that is, subcontract the management of particular housing units to a nonprofit entity? I don't know whether that requires HUD approval or does not require HUD approval. That is something I would like to be informed about.

The resolution says that within 30 days of the approval by the court of a modification of the consent decree, a consultant will be retained to study the management of existing public housing in Yonkers. I confess to be at a total loss to understand why such a study is linked or conditioned on a modification of the consent decree. Surely, that is something that Yonkers is free to do now without court approval or intervention or the approval or intervention of any of the parties.

What I would like to do is to set a timetable for a response by the Department of Justice, by HUD, by the school

board, and the opportunity for comment by other interested groups in the community to Court Exhibit A. This involves one additional site?

MR. SCULNICK: Yes, your Honor.

THE COURT: Mr. Herold, the Austin Avenue site we are not hearing about now for the first time in this case. Has HUD done any study or analysis of the Austin Avenue site?

MR. HEROLD: I'm not sure, your Honor. I think it may have done what we called a preliminary evaluation of the site sometime in the past, but not a full preapproval review. It may be necessary to go out and look at the site again.

THE COURT: What I would like to do is set the end of this month as the time for all comments. I have very much in mind that it is at the end of this month that HUD will have completed its review of the pending requests for proposals on the existing plan, and so we will have before us the existing plan and HUD's comments on a request for proposal. We now have the city's recommendations, and we will have the comments of the other parties.

MR. HEROLD: If possible, your Honor, I would like to request that any HUD comment to this proposal not require any sort of additional review of the Austin Avenue site unless it is determined to go forward with that so that the individuals involved any devote their attention to reviewing the existing RFP.

THE COURT: I want to defer that. I want to make two comments on that. Nothing, nothing, that has been said or that has transpired since the timetable was established with the court and the parties relating to the processing of the existing plan and the RFP alters that timetable. Manpower is not to be diverted from that review or process.

With respect to the Austin site, I ask that you review your files and consult with the HUD personnel with respect to how much of a study has already been done of that site and advise the court whether, in your opinion, further inspections or analysis are appropriate. Surely, in an agency of the size

and with the resources of HUD, if such further analysis is required, it should be possible to assign personnel to that task without interfering with the review of the existing RFP. HUD surely has more than one project under consideration at a time.

But it may all be moot. My impression is that Austin was the subject of considerable scrutiny previously.

We will get everyone's comments with respect to Court Exhibit A by September 30th. I will schedule a conference or a hearing promptly thereafter. I like to schedule hearings as early as possible so people may make plans. I realize that we have out of town counsel in the case. But I think it is very difficult to estimate now how long after September 30th would be appropriate to do the study and review.

Mr. Heffernan?

MR. HEFFERNAN: Your Honor, I have a fairly basic question here. Counsel for the city has represented that this specific, I suppose we would call it, request for modification has been put forward by the city, namely, the majority of the City Council. I would like to know in what form that city approval has come, whether or not there has been a vote of the City Council on this specific propose. If not, I think it would be appropriate to have a council vote. Quite frankly, your Honor, I think we have been down this road before where if we don't have a City Council action on something, I don't think we have the city position on something.

THE COURT: Mr. Sculnick?

MR. SCULNICK: First, the two additional resolutions forwarded to the court reflect what the city believes to be a concurrence of the majority of the City Council for these specific changes, five members. Plus, I think we are in a position to represent that on the basis of our informal discussions and as a result of the discussions and negotiations that led up to preparing just such a document to be submitted to the court.

THE COURT: You have the benefit, as neither I nor Mr. Heffernan have had, of having compared Court Exhibit A

with the resolution. Are you saying that it is your view that Court Exhibit A implements the resolution?

MR. SCULNICK: I am not in a position to say they are identical, but certainly their intent is to be the same.

MR. HEFFERNAN: It is my understanding that the resolution was a nonbinding resolution. I don't know that they are exact copies. The Justice Department does not have its head buried in the sand. Based upon what we have been learning for the past several days, I think there is a serious question about whether there is City Council support for this plan. I don't think it is unreasonable to ask for a vote on this. Frankly, if we don't have the council support on this plan, I think we are wasting our time and the judge's time and the parties time in responding to this.

MR. SCULNICK: May I respond, your Honor?

THE COURT: Yes.

MR. SCULNICK: Your Honor is well aware that we have been reluctant to represent to the court that we have the agreement of the City Council without a good-faith basis for so believing. I think having another vote at this point is really a pointless act.

THE COURT: Why is it pointless? When for the first time was the Austin site the subject of this resolution? When did that reenter the consideration of the housing remedy?

MR. SCULNICK: In this most recent episode, last week Wednesday, your Honor, a week ago Wednesday. Of course, it has been a familiar site for quite some time. But in this particular episode, just a week ago.

THE COURT: It seems to me that there is a virtue in Mr. Heffernan's suggestion which is more than the mere question of authority, and that is the extent to which there is, in fact, support in this plan. I have been deluged with letters from Canopy and from Park Hill Residents Association and from other groups decrying what appears to be a reversion to the concept of higher density, which was something which had

been considered and set aside in preference for the lower density seven-site scattered housing. I really did not want and do not want at this time to get into a discussion of the merits of the proposal. But Mr. Heffernan is certainly right that it would be unfortunate if all the time and effort and emotion was directed toward this proposed amendment only to learn that it, in fact, did not have the broad support which was envisioned when I made the statement that we would welcome changes to the plan which had the support of the community and the parties.

I recognize that any plan is going to have its detractors, and there are many who think that it is simply a matter of "not in my backyard." What is the problem, now with the benefit of Court Exhibit A, of having the City Council adopt a resolution urging modification of the consent decree to embody the order?

MR. SCULNICK: I would appreciate the opportunity first to discuss some of these items in chambers. But I think basically the city's concern is that every time a City Council meeting is held on one proposal or another, you are going to draw a lot of debate both pro and con which tends to derail the positive movement toward a resolution which will, if the court please, be positive.

THE COURT: Let me put it this way. Assume, solely for the point of argument, that as a result of the discussions and the comments the court and the parties, other than the City of Yonkers, agree to a second consent decree which is, in whole or in significant part, in conformity with Court Exhibit A. Are you prepared, on the basis of the existing City Council resolution, to sign such an amended consent decree on behalf of the City of Yonkers?

MR. SCULNICK: Your Honor, I think that type of a hypothetical brings the negotiation process into the media, into the public, in a way that makes it very difficult to answer that truthfully. I think that the city has presented these --

THE COURT: Let me make another suggestion. Let's go forward with our timetable, that is, comments in two weeks, the end of the month. Understand that the court will

not entertain any amendment to the consent decree proposed by the City of Yonkers unless and until it has assurance that that proposed amendment is supported by a majority of the City Council. Otherwise, I think you would agree, we are really just spinning wheels.

MR. HEFFERNAN: Your Honor, I don't quite understand what you just said.

THE COURT: What I am saying is that I adhere to my direction to the parties to consider and comment on this proposal and to submit their responses. But the court will not, when it has all those comments -- and I hope that the comments will be exchanged not only in writing to the court but informally among the parties -- but the court will not amend a consent decree to substitute another decree which is said to be a proposal by the City of Yonkers unless it has the assurance that that is, in fact, the case, which assurance is best furnished by a City Council resolution.

MR. HEFFERNAN: Your Honor, if I can object. Basically, what you are doing is you are telling the United States and HUD and the other parties to comment on something that we have no real assurance is going to be passed on the City Council.

THE COURT: That is exactly what I am doing. That means that there is going to have to be an expenditure of some time and effort on everyone's part in the next two weeks, and it may all come to naught. It may be that much of what has happened in the past two years will all come to naught. I think that is in the nature of the process.

MR. HEFFERNAN: Your Honor, I just think --

THE COURT: Frankly, I think that is not a very heavy burden.

MR. HEFFERNAN: I think it just ignores past history of what the City Council has done in this case. I don't understand whey the city cannot commit itself to something it has put forth today as its proposal.

THE COURT: I am prepared -- Mr. Sussman will remind me of my perpetual unjustified optimism -- to proceed upon the assumption that the City of Yonkers has indeed learned what one city councilman is quoted as having said was a very expensive civics lesson.

Mr. Sussman?

MR. SUSSMAN: Briefly, I do want to respond to some of the questions your Honor raised now and not in chambers, because given that that I were raised here I think, frankly, I would have to respond to them today in some form, and I think the court should hear the response directly.

First of all, let me just say one thing prefatory to that. I think it needs to be said very directly. In our meeting of two Fridays ago with this court, held off the record but it was transcribed, the court indicated that compliance had to occur but that the court might consider or would consider on the merits suggestion, to, quote, improve or better, closed quote, the plan.

In my own judgment, and I believe the judgment of the board of the NAACP, what Court Exhibit A represents is a joint effort by the NAACP and the city to produce such an outcome. It is not meant in disrespect in any regard to the court. The city did comply first. It was my constant position in discussions that compliance would have to occur.

THE COURT: Let me interrupt you because in no way, in no way do I regard any proposals to modify the existing plan as being disrespect for the court. There is no pride of authorship in the consent decree plan. There is particularly no pride of authorship in the consent decree plan because the court is not the author of that plan.

MR. SUSSMAN: I understand that. But I do think that, unfortunately, and I am not suggesting the court has created the impression, but I think it has been created that there are those who are saying that by trying to sketch out with the city in the period of last week what might constitute, quote unquote, improvements and what might be acceptable to us as, quote unquote, improvements before compliance, we were

somehow compromising the integrity of the process. I just don't believe that because I think it should be clear on the record that at every meeting at every stage I insisted there be compliance before any presentation be made. I want that to be made for the record in light of matters stated by others which I am frankly trying not to respond to each matter.

THE COURT: It was my understanding and it was confirmed in that 5 p.m. telephone conversation on September 8th that it was the position. NAACP said that there would first have to be compliance. I also, while we are on that subject and relevant to your remarks, know that there was reference made in the media to the court's having refused to hear the substance of the proposed modifications. I want to make it clear that I did that not because I was resistant or adverse to any changes in the plan that would be generally regarded as improvements but because I wanted it to be clear beyond anyone's possible doubt that compliance had to be unconditional.

MR. SUSSMAN: Correct. That was certainly made clear. Frankly, I think the timing of that call and the court's statement was extraordinarily helpful in producing the resolution of that evening. But I also think important to the resolution was an understanding by all involved in Yonkers that the court had stated the Friday previous that improvements were possible, without of course sketching any improvements or discussing them in any detail.

What you have before you as Court Exhibit A, and I am not going to go through it and try to defend it here today -- another day for that may arise, I hope -- is an effort by the NAACP and the city to provide that set of improvements which we believe has social virtue as well as practical virtue. I do want to respond specifically to the questions that your Honor raised.

The first had to do with cost issues.

THE COURT: My eye has just fallen on the paragraph in which it says that the city agrees to pay the difference.

MR. SUSSMAN: Yes. That related, your Honor, to conversations which had occurred, and I am sure these are at this point a matter of record, with regard to total development costs that HUD had made available or would make available within its administrative discretion and the possibility that those might not suffice to cover all costs. The city, through this document, has agreed to assume the additional costs on those four free-standing sites.

I want to make one other point on costs because I think it is important. In the course of our discussions, and I am sure the court is aware of this, the State of New York, through the governor directly and his counsel directly, have said to us that I am willing to provide state assistance with respect to the affordable housing to be built in Yonkers. That I have made no specific commitment, I want to make that clear. But it is my understanding that the governor may have further information on this available.

What we are proposing on the two mixed sites, just so it is clear, is some number of units of public housing, some number of units of affordable housing, which would of course go toward realization, in an expeditious way in my judgment, of the affordable housing goals, and some larger number of market-rate housing. It is our contemplation that the affordable housing to be built on those two sites would be built with the contribution of the city as set forth in the long-term ordinance and the long-term plans. In other words, the inducements and incentives would be part and parcel to that and part of that process in terms of cost issues. I just thought that I would inform the court of that since there may be confusion as to it.

Your Honor also asked the question about marketing and ownership and, I believe, the running of the units and how that would work. It is my understanding that the MHA may request from HUD a dispensation or permission which would allow it to, in fact, contract for management services with a not-for-profit and, in fact, jointly, in a sense, manage the projects. We would hope that that would be attempted in this situation.

Let me respond to the issue with respect to the west side of Yonkers, which the court raised. First of all, it is not

the City of Yonkers which is requesting, as is included in Court Exhibit A, a study of the management and the city contribution to extant west side housing; it is the NAACP. We believe it does have a place here for the following reason. We do not believe that we can assure east Yonkers residents of the optimal management of public housing at the same time that we allow in place management which is widely perceived, whether fairly or unfairly--and that is why we want this study to be done and then a commission of Yonkers residents to review the study and implementation of its representations. We do not believe we can allow that 2400 units of housing to be managed in a way which does not provide equity vis-a-vis the housing in east Yonkers. We can't simply focus on the housing in a white neighborhood on ensuring proper management, while allowing the--

THE COURT: You mean equity in the sense of fairness?

MR. SUSSMAN: That is correct. We must have, if we are going to focus on the 200 units, some focus to the extent of equity on the extant management. The MHA obviously would have every opportunity, when a consultant is employed and then the three-person commission nominated by Mr. DeLuca--

THE COURT: No, my point was not in any way to disparage there being such a study. My point was simply that that was something, it seems to me, which was entirely within the power of the City of Yonkers to do and did not require the court's approval or the approval of any of the parties.

MR. SUSSMAN: I am trying to explain to the court why it is a little more complex than that. The reason it is more complex is that the management of the 200 units is clearly an issue this court will focus on if it has not already. To set up a management three, if one wants to look at it this way which optimizes the management of the units, while we are aware of the conditions or the claimed conditions in the west side, creates a situation which appears and in fact would be inequitable. I think you can't simply look at one and say the other the city can do on its own. We would not see as enforceable some agreement with the city in this consent decree

in exchange for having management discretion in east Yonkers but not west Yonkers. We think that I are linked not just politically but in terms of the individuals living on both sides of the city. I suggest to the court that it is, but we can leave until another day whether that is important or not.

Now I want to talk about timing. In all of their discussions, discussions with Mr. Pickelle and Mr. DeLuca, those that Mr. Sculnick was involved with, and those were the primary parties to these discussions, one matter was clear. I don't think anyone will deny this or contradict it. That was that we recognize the need for expedition. We recognize that there is an RFP review process that is supposed to be consummated by the end of this month, and that this process has gone on for too long, that this process is socially destructive, as it has been. Our hope, frankly, was that quite quickly we would have guidance from HUD--and we understand the integralness and importance of HUD's role and are not trying in any way to overrule it--on several issues. One, the useability of Austin Avenue, not simply for public housing residence, but of course in the fashion we are speaking of, since I think that might change the equation somewhat and it is obviously relevant, and of course a view from HUD as to whether the mix that we have proposed at Whitman and Austin would be within their range of tolerance, if I can use that word.

On that mix, the final comment is this. There had been a consensus between the United States and the NAACP in this case in 1986 and 1987 on the Whitman site that we should go with some mixed use. It may not be identical mixed use to the one now proposed, but there was a clear consideration of that and a concern that we not use a huge site, 18 acres, for 48 units of housing. I understand the density concerns that have been raised by Canopy and other well-meaning people. But in terms of social utility, in terms of producing housing in an efficient manner, that is a very large site, and we think density can be respected on a site of that size with an accommodation of the units that we have been proposing.

I think that proposal should not be seen as coming out of the left field but rather is consistent with a long line of thought in this case which, though ultimately not used, was really, in my judgment, not rejected for any principle reason.

We welcome the court's willingness to review this plan with us. It is not set in concrete. There can be changes to it. It does not represent, as the Herald Statesman had editorialized, a rush job, but at least for me a culmination of many years of thinking about these issues, and it should not be regarded as something that was thrown together in five minutes.

THE COURT: Does anyone else wish to be heard? I will meet with the parties in chambers. But does anybody else wish to be heard in open court?

Mr. Dudley?

MR. DUDLEY: Your Honor, I have a couple of questions. One is, it seems to me, that Court Exhibit A is understandably, and I suppose necessarily at this point, a sketch. I would assume that there is a lot of flesh that needs to be put on the bone that isn't here yet. I would like to inquire of the NAACP and the city, through the court, if I may, whether it is anticipated that this document is going to be made more specific so that other parties, including the school board, will have a better opportunity to comment meaningfully on it than it seems to me we do at this point.

For example, our interest, obviously, is in what happens at the Whitman site and what significance this has for the school board's interest in the utilization of the building at Whitman. There isn't any indication in this document, so far as I can see, as to what kind of a layout at Whitman is envisioned, what parcels at Whitman would be used, which would be preserved, what would happen with the building, and so on and so forth. That is one question in terms of process that I have.

My second question relates to the role of Mr. Newman and the cautionary remarks that Your Honor made earlier this morning. We have in the past, I know I have in the past, from time to time tapped the expertise of the outside housing adviser. His views on sites have been helpful to me. That I have certainly been relevant. Frankly, to this point the school district has not retained a planning expert or a housing expert to assist it in an independent analysis of proposals such as these. I guess I am looking for a little further guidance from the court

as to what communications are permissible with Mr. Newman and which are not.

THE COURT: Direct your inquiries to the court. If that I are matters that fall within the areas of his expertise and I deem it appropriate, I will pass them.

MR. SUSSMAN: May I respond to the question?

THE COURT: Does that respond?

MR. DUDLEY: If I could get a response to my first question, it would be helpful, which was how to get more detail.

THE COURT: Further detail of this. I am wondering whether you want to respond to that now or whether you want to respond to that in conference.

MR. SUSSMAN: I think I should say something publicly to that.

Both with respect to the precise site at Austin Avenue, where Mr. Newman and perhaps Your Honor will recall, there were two specific sites discussed, site D and site Q at specific points in time and with regard to the specific site at Austin and how the buildings could be used by all concerned, we purposely left those issues open. We felt, for example, that with regard to HUD, there are two specific sites at Austin. We have no particular view that one of those sites rather than the other must be used. Our view is that that I are two sites, that I both have advantages from our point of view, and perhaps disadvantages. We don't want to be wedded to one. We felt that was a process that we should be involved in with HUD. As your Honor intimated a short time ago, hopefully there will be informal contacts and we can get that straight.

Likewise with the school board. We would like to have contact with them to see if we can accommodate the social services needs, the recreation needs, the day care needs which the people will have and to accommodate the school board's needs. We don't see that as impossible.

MR. CURRAN: Maurice Curran for the school board. I now would like to mention to the court that September 2 order which is still in effect. This has to do with respect to the creation of the separate trust fund. I believe, your Honor, that the order should remain in effect until the matter is stabilized. The court stated clearly that there has been compliance. There seems to be no question about compliance. On the other hand, the court leaves open the question as to a possibility of resumption of fines. At the outset of the court's remarks--

THE COURT: No more than exists in any litigation. I am not predicting future contempt on the part of Yonkers. It is my devout wish that that not take place. I don't think that one can talk about a permanent alteration in the fiscal management of the city because it was at one point in contempt.

MR. CURRAN: The board's position, your Honor, is that the court's order up to the present time has been implemented only to the extent of a bank account. The funds remain commingled and mixed. The board's position is that I should remain so. The board's position is that the special account fund, to the extent it contains revenues, should be retained in that special account until released by the court back to the city.

THE COURT: How much money is now in the special account? I am not certain at what point we started splitting the checks.

MR. CURRAN: I believe it is approximately 200,000.

THE COURT: Is that what you are directing your remarks to, whether the $200,000 goes to the school board or back to the city?

MR. CURRAN: We are not saying it should go to the school board. There is only one fund and it should remain one fund. We believe the order should remain in effect with respect to the creation of a trust fund.

THE COURT: You mean in the event that there is a further contempt and further payment of fines?

MR. CURRAN: In the event that this present order is not stabilized.

MR. SUSSMAN: That has nothing to do with it.

THE COURT: When Yonkers was purged of contempt, as it has been, that order became inoperative. If we ever reach the unhappy state that there is again contempt, we know several things. We know that the fine level begins where it left off, that is, $819,000 or whatever it is for the first day and then the million, and then it caps at a million thereafter. We know that. I would certainly, if that happened, unless there is a radical change in circumstances, reinstitute the arrangement between the school board and the city with respect to fines, and so on. I see no reason now why that should continue to be an operative order.

MR. CURRAN: The board of education agrees with the court. It is inoperative for all practical purposes at the present time. If the court, therefore, at this point right now decided the court order is no longer in effect, the board of education fully consents to that, your Honor, and requests that whatever funds are in the special account be returned to the city. This court made specific reference to the imposition of fines to the individual taxpayers--

THE COURT: Why don't you, together with counsel for the city, prepare an order which I can give to the cashier.

MR. HEROLD: I on behalf of HUD I would like to say that we do object to going forward with this review. The court mentioned earlier that Yonkers had learned a very expensive civics lesson. But it is my understanding that if Yonkers fails to pass the necessary ordinances or resolutions to support this plan down the line, that would not be an act of contempt.

THE COURT: That is correct, it would not be an act of contempt, because if Yonkers doesn't pass it, it will never be embodied in a court order.

MR. DUDLEY: That is correct. So there is no penalty to Yonkers.

THE COURT: Yes. So HUD will have to expend time and effort in the next two weeks, as will the Department of Justice, as will all of us, and it may be a wasted effort. It is worth it.

We have a poor family awaiting a sentence, and moments spent awaiting sentence are very long moments indeed. I would like to adjourn and resume at about 11:45 in the robing room.

(Recess)

Opinion of United States Court of Appeals, Second Circuit, Dated September 22, 1988

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1504, 1505—August Term, 1987

(Argued: July 20, 1988 Decided: September 22, 1988)

Docket Nos. 88-6140, -6146

YONKERS RACING CORPORATION and ST. JOSEPH'S SEMINARY AND COLLEGE,

Petitioners-Appellants,

—v.—

CITY OF YONKERS,

Respondent-Appellee,

—and—

UNITED STATES OF AMERICA and YONKERS BRANCH, NAACP, *et al.*,

Intervenors-Appellees.

Before:

ALTIMARI and MAHONEY, *Circuit Judges*, and KORMAN, *District Judge*.*

---

* The Honorable Edward R. Korman, United States District Court for the Eastern District of New York, sitting by designation.

Appeals from an order denying petitioners-appellants' motions to remand to state court, following removal, Article 78 proceedings commenced in the Supreme Court of the State of New York, Westchester County and from an order denying and dismissing on the merits petitions for relief pursuant to Article 178, entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*).

Affirmed in part, vacated and remanded in part. Judge Mahoney dissents in a separate opinion.

ROBERT D. MEADE and MICHAEL J. TRAINOR, White Plains, New York (Bleakley & Schmidt, White Plains, New York, of counsel), *for Petitioners-Appellants.*

MICHAEL W. SCULNICK, New York, New York, (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, New York; Paul W. Pickelle, Corporation Counsel, City of Yonkers, Yonkers, New York; Rex E. Lee, Carter G. Phillips, Mark D. Hopson, Gary I. Resnick, Sidley & Austin, Washington, D.C., of counsel), *for Respondent-Appellee.*

LINDA F. THOME, Attorney, United States Department of Justice, Washington, D.C. (Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn, Attorney, Department of Justice, Washington, D.C., of counsel), *for Intervenor United States of America.*

MICHAEL H. SUSSMAN, Counsel, Yonkers Branch, NAACP, Yonkers, New York (Sussman & Sussman, Yonkers, New

York, of counsel), *for Intervenors Yonkers Branch, NAACP, et al.*

ALTIMARI, *Circuit Judge*:

These two separate appeals, which we have consolidated for purposes of this opinion, follow from the housing remedy portions of a prior judgment, entered in the United States District Court for the Southern District of New York (Sand, *J.*), finding the City of Yonkers (the "City" of "Yonkers") liable for a pattern and practice over a span of forty years of deliberately concentrating federally subsidized low income housing in the southwest quadrant of Yonkers in order to maintain racial segregation, and ordering Yonkers, *inter alia*, to provide sites for 200 units of public housing in nonminority areas of the city. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), and Housing Remedy Order, 635 F. Supp. 1577 (S.D.N.Y. 1986) *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

This case concerns the consent decree ("Consent Decree") reached between the City of Yonkers, the United States and the Yonkers chapter of the National Association for the Advancement of Colored People (NAACP) designating 7 public housing sites for 200 units of housing east of the Saw Mill River Parkway. Two of these sites currently are owned by petitioner-appellants Yonkers Racing Corporation (the "Raceway") and St. Joseph's Seminary and College (the "Seminary"), respectively. Pursuant to the terms of the Consent Decree approved by the Yonkers city council (the "City Council") and entered by the district court on January 28, 1988, the City initiated, under pain of contempt, condemnation proceedings in state court against the Raceway and Seminary sites. Thereafter, the Raceway and the Seminary filed separate petitions against the City in the Supreme Court of the State of New York, Westchester County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to enjoin the condemnation of their respective properties. On May

27, 1988, Judge Sand ordered the City of Yonkers to remove the Article 78 proceedings to the district court.

The Raceway and the Seminary appeal from an order denying their motions to remand the Article 78 proceedings back to state court and from an order dismissing their Article 78 petitions on the merits. The district court held that removal was authorized under the federal removal statutes, 28 U.S.C. §§ 1441, 1443, and the All Writs Act, 28 U.S.C. § 1651. In addition, the court determined that the extraordinary nature of the proceedings warranted application of statutory exemptions from the notice, hearing and review requirements of the New York Eminent Domain Procedure Law (EDPL) and from the provisions of the State Environmental Quality Review Act (SEQRA). The district court also found that, even if such exemptions did not apply, there was such substantial compliance with the notice, hearing and review provisions of state law that petitioners' statutory rights were not violated. Finally, the district court considered the Seminary's first and fourteenth amendment free exercise challenge to the taking of its property and held that, since the inclusion of the Seminary's property was an integral part of the Consent Decree and thus essential to efforts designed to remedy racial segregation in housing, no valid claim for a violation of the first amendment had been advanced.

On appeal, the Raceway and the Seminary principally contend that removal was improper under the federal removal statutes and the All Writs Act since only a defendant is permitted to remove and the City of Yonkers was a plaintiff, not a defendant, in the underlying condemnation proceedings. Petitioners further contend that not only are the exemptions to the EDPL and SEQRA inapplicable but that full compliance with the notice, hearing and review provisions of the statues is required. The Seminary separately argues that the district court erred in rejecting its free exercise defense to the condemnation of its property without the benefit of a hearing to determine whether other reasonable alternatives exist to the taking of religiously owned and used property.

For the reasons that follow, we affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction, but solely on the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in all respects except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration.

BACKGROUND

The underlying facts of the Yonkers litigation are set forth in exhaustive fashion in Judge Kearse's recent opinion affirming the district court's finding of liability against the City under both Title VIII of the Civil Rights Act of 1968 (the "Fair Housing Act"), 42 U.S.C. § 3601 *et seq.*, and the equal protection clause of the fourteenth amendment, and therefore need not be restated here. For our purposes, it suffices simply to emphasize that this court concluded, as did Judge Sand, that " 'the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures[,] to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation.' " 837 F.2d at 1194 (quoting 624 F. Supp. at 1373).

To remedy the statutory and constitutional violations, the district court in part ordered the City to fulfill its pre-existing commitment with the Department of Housing and Urban Development (HUD) to provide sites for 200 units of public housing east of the Saw Mill River Parkway funded by HUD's Community Development Block Grant program. 635 F. Supp. at 1580. Following this court's affirmance of the housing remedy order, the City, in January 1988, entered into extensive negotiations with the Department of Justice and the NAACP concerning compliance by the City with its obligation under the Housing Remedy Order to designate public housing sites. Under threat of contempt sanctions by the district court for

non-compliance with the Housing Remedy Order, the City eventually reached an agreement with the Department of Justice and the NAACP designating 7 sites on which to build a total of 200 units of public housing. The agreement was incorporated into the Consent Decree which required the City to initiate eminent domain proceedings, if necessary, to acquire these sites within 60 days. As part of the Consent Decree, HUD was to review and approve the housing sites while the City was in the process of acquiring title to the 4 designated properties which were privately owned. Within 80 days of the entry of the decree, final HUD approval was to have been obtained and the City was to have solicited proposals from developers for construction of the housing.

Two of the privately owned properties included the Raceway site, a 1.2-acre parcel now used as a parking lot and currently slated for 24 units of housing, and the Seminary site, a 2-acre parcel on the border of the Seminary's 44-acre property and also currently slated for 24 units of housing. On January 25, 1988—the date that the City reached agreement with the United States of the Consent Decree—the Roman Catholic Archdiocese of New York on behalf of the Seminary issued a statement concerning the designation of the Seminary site:

> The Archdiocese of New York has been informed that there has been a recent decision to build units of affordable housing upon property now belonging to the Archdiocesan Major Seminary, Saint Joseph's, in the Dunwoodie section of Yonkers. Since it has been decided to proceed with these plans, the Archdiocese will do everything possible to promote the success of the effort . . . .

Advised of the Cardinal's intent to facilitate the construction of public housing on the Seminary site, Judge Sand welcomed the Church's participation and support. A month later, the City of Yonkers, pursuant to the terms of the Consent Decree, made offers of purchase to the owners of each privately owned site; the Archdiocese rejected the City's offer

on March 18, 1988. On March 21, John Cardinal O'Connor wrote to Judge Sand stating that while the Archdiocese supported the addition of public housing in Yonkers, it believed there were "serious problems in the current plan." Cardinal O'Connor expressed concern that four of the seven housing sites would be located in one parish in southeast Yonkers. The cardinal also objected to the public perception that he had "volunteer[ed]" the Seminary site. His Eminence explained that he had decided in January to " 'yield graciously' " to the City, apparently believing (albeit erroneously, as it later became apparent) that the Seminary site would be condemned with or without his consent.

The district court responded by suggesting that the City and the Archdiocese consider substituting an alternate site in place of the Seminary property. In the interim, the court ordered the City of Yonkers to initiate eminent domain proceedings against the Seminary as well as against the Raceway, which also had rejected the City's offer to purchase its property. On April 24, 1988, two days after the City filed condemnation petitions in state court, the Cardinal declared that the Consent Decree was "fatally flawed." In addition, he said he was "deeply resentful" of the process which led to the condemnation action and which put the Archdiocese in the "humiliating position" of being perceived as "so resistant to making the property available that the court had to require the city to condemn the property."

The City of Yonkers then attempted to vacate the Consent Decree on the basis of a "mutual mistake" between the City Council and the Archdiocese. In support of its motion to vacate under Fed. R. Civ.P. 60(b) dated May 2, 1988, the City argued that the Cardinal's endorsement of the Consent Decree and his willingness to sell the Seminary site had been essential to the City's approval of the decree—the support of the Catholic Church being critical in order to achieve acceptance of the housing plan by the City's residents, a substantial portion of whom are Catholic. At oral argument on the motion to vacate, the district court determined that while the Cardinal's support for the Consent Decree had been a "welcome occurrence," it had not been so crucial that his subsequent

withdrawal of support was sufficient to invalidate the decree. In any event, the court noted that, even assuming there had been a mistake, the proper course of action for the City was simply to propose a modification of the Consent Decree designating an alternative to the Seminary site. Judge Sand thereupon directed the City to meet with the Archdiocese to see if some accommodation could be reached.

Meanwhile, the Seminary and the Raceway filed answers with affirmative defenses to the condemnation petitions, and on May 11, 1988, instituted Article 78 proceedings against the City claiming that the proposed condemnations were "null and void." The parties also sought injunctive relief preventing the City from acquiring the two sites. By the end of May, once it became clear that the City and the Archdiocese had failed to reach any agreement regarding the designation of an alternate housing site and that the City Council would not propose any modification of the Consent Decree, the United States filed an order to show cause in the district court seeking removal of the Article 78 proceedings from state court. On May 27, 1988, the district court granted the order directing the City to remove the Article 78 proceedings to federal court and permitted the United States and the United States and the NAACP, plaintiffs in the underlying civil rights litigation, to intervene as respondents.

In ordering removal of the Article 78 proceedings, the district court explained:

> During the informal discussions which preceded entry of the consent decree, the question was raised whether [the] condemnation proceedings should be commenced in [the district] court or in state court. It was then the understanding of the parties that the sole issue which would be present in the condemnation proceedings related to value, that is, the amount to be paid to the property owner whose land was condemned by the City of Yonkers in implementation of the housing remedy order. It was with that understanding and intention that the consent decree did not contain a provision requiring that the

> condemnation proceedings go forward in [the district] court . . . .

Judge Sand also found a "significant risk" if removal were not ordered that the City of Yonkers "[would] be confronted with inconsistent orders from two courts [—] . . . an order of [the district] court to proceed with the condemnation of the two properties, and an order of [the] state court either not to proceed with that condemnation or to proceed pursuant to [procedures] and a timetable . . . inconsistent with [that] established by [the district] court." While the All Writs Act was, according to Judge Sand, to be invoked only as a "last resort," the court determined that, rather than allow the parties to go forward in state court knowing full well that there would be resort to the district court for injunctive relief against the implementation of any state court order inconsistent with the Consent Decree, the "more appropriate procedure" was for the district court to exercise removal jurisdiction over the Article 78 proceedings in the first instance. In sum, the court characterized the Article 78 proceedings as a "classic case" for invocation of the All Writs Act to effectuate removal.

Following removal, petitioners filed motions to remand the Article 78 proceedings to state court. On June 8, 1988, the district court heard argument from counsel on the motions to remand, the merits of the Article 78 proceedings and the City's motion to vacate the Consent Decree. With regard to the motions to remand, the court held that removal was authorized under the general federal removal statute, 28 U.S.C. § 1441, the civil rights removal statute, 28 U.S.C. § 1441, the civil rights removal statute, 28 U.S.C. § 1443, and the All Writs Act. The court further stated that removal was appropriate because the petitioners' defenses to the condemnations were best litigated in federal court with the benefit of an existing record, that removal would not deprive petitioners of their right to be heard on the merits of their Article 78 petitions, and that removal would eliminate the possibility of inconsistent orders from two courts.

On the merits of the Article 78 petitions, the district court concluded that the "emergency situation" provision of section 206(D) of the EDPL applied in the instant case to exempt the City of Yonkers from compliance with the notice, hearing and review requirements of the statute, and that the proposed condemnations were exempt from SEQRA pursuant to the court order provisions of SEQRA's implementing regulations. 6 NYCRR § 617.2(q). Moreover, according to the district court, the process by which the public housing sites were designated and reviewed constituted substantial compliance with the purposes of the notice, hearing and review requirements of state law.

As for the Seminary's free exercise challenge, the district court indicated that aside from the issue of the validity of the Seminary's claim of a protectable religious purpose for the two-acre site under the first amendment, the alleged interference with the pastoral contemplative atmosphere of the only seminary in the Archdiocese had to be balanced against the need to vindicate the federal constitutional rights of those citizens of Yonkers who have been denied fair housing. In striking the balance in favor of vindication of fair housing rights, the court found the inclusion of the Seminary site in the Consent Decree to be essential.

Accordingly, the district court denied petitioners' motions to remand the City's motion to vacate the Consent Decree,[1] dismissed the Article 78 petitions, and ordered the Seminary and the Raceway to "present to [the state c]ourt a proposed order stating that, insofar as all substantive grounds from objection to the proceedings in question have been . . . resolved in [federal c]ourt, . . . the eminent domain proceedings shall go forward in accordance with State law . . . to determine the sole remaining issue of valuation of [the] properties."

---

[1] The City of Yonkers has not sought appellate review of the denial of its motion to vacate the Consent Decree and indeed is precluded from doing so under the terms of that decree.

DISCUSSION

I. JURISDICTION

A. The Removal Statutes

Section 1441(a) of Title 28 provides in pertinent part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* . . ., to the district court . . . for the district . . . where such action is pending" (emphasis added). The civil rights removal statute, 28 U.S.C. § 1443(2), provides in pertinent part that any civil action commenced in state court "[f]or or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law" may be removed "by the *defendant* to the district court . . . for the district . . . embracing the place wherein it is pending" (emphasis added).

The initial question to be considered on this appeal is whether the City of Yonkers was correctly deemed by the district court to be a defendant for removal purposes under either statute. Appellants argue that Yonkers was not a proper party to petition the state court to remove the Article 78 proceedings since it was the plaintiff in the underlying condemnation proceedings, and the Article 78 proceedings were merely state law procedural vehicles for raising defenses to the condemnation petitions. *See Matter of Piotrowski v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511, 512 (3d Dep't 1984) (defenses to condemnation action are properly brought via an Article 78 proceeding); *but cf. Town of Coxsackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106, 107 (3d Dep't 1984) (challenge to condemnation may be made by way of an answer in that proceeding). In this regard, appellants cite two Supreme Court decisions, *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907) and *Chicago, Rock Island & Pac. R.R v. Stude*, 346 U.S. 574, 580 (1954), for the proposition that, regardless of the state's procedural provisions, where a party seeks to remove a

condemnation proceeding to federal court, the condemnor is the plaintiff and the condemnee is the defendant.

The United States and the NAACP,[2] intervenors herein, respond by pointing out that the actions removed from state court were the Article 78 proceedings, not the underlying condemnation proceedings. Indeed, the condemnation actions are still pending in state court. In the Article 78 proceedings, the City of Yonkers clearly was the defendant. Intervenors argue that the Article 78 actions were separate proceedings from the condemnation actions and that the *Mason City* and *Chicago, Rock Island* decisions are distinguishable.

Both Supreme Court decisions cited by appellants involved Iowa eminent domain statutes under which the condemnee was required to initiate a proceeding contesting the assessment of the condemned property's value arrived at by a sheriff's jury. In that separate proceeding, the condemnee was the plaintiff under state law. In each case, the Supreme Court held that in construing the removal statute, federal law determined who was the plaintiff and who was the defendant, *Chicago, Rock Island*, 346 U.S. at 580; *Mason City*, 204 U.S. at 579; *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (state procedural law cannot supersede privilege of removal granted by federal statute), and that the condemnor remained the plaintiff for purposes of removal.

Intervenors contend that the Article 78 proceedings were fundamentally different from the state court actions in *Mason City* and *Chicago, Rock Island*, which constituted challenges

---

[2] In the district court, the City of Yonkers opposed Judge Sand's assertion of removal jurisdiction over the Article 78 proceedings. In its brief on appeal, the City has again questioned whether the district court properly "divest[ed] the New York Supreme Court of jurisdiction to resolve the Article 78 proceedings." The City of Yonkers Brief at 8. Nevertheless, because in the City's view, "it would be wasteful to require the matters to be relitigated in the state court," *id.* at 9, the City has argued on appeal in favor of an affirmance on the jurisdictional issue as well as on the disposition of the merits of the Article 78 petitions.

to property valuations. Their argument essentially is that the issues decided in the removed Article 78 proceedings—whether the City complied with state procedural requirements, whether the sites were properly designated, and whether the condemnation of the Seminary site violated the first amendment—were separate issues resolvable apart from the question of the valuation of appellants' properties, the sole remaining question in the condemnation actions. On the other hand, as appellants persuasively point out, the defenses they raised in their answers to the condemnation petitions were identical to their claims in the Article 78 petitions.

In view of the foregoing, we have serious doubts in light of *Mason City* and *Chicago, Rock Island* whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the Article 78 proceedings to federal court. Quite simply, a party who is in the position of a plaintiff cannot remove. *Cf. White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) ("right to remove is statutory, jurisdictional and absolute"). Nevertheless, we need not resolve this difficult question since the district court asserted an independent basis for removal jurisdiction under the All Writs Act. We turn now to consideration of removal under that statute.

B. The All Writs Act

The All Writs Act (the "Act") provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act "authorizes a federal court in exceptional circumstances to issue such orders to persons 'who, though not parties to the original action or engaged in wrongdoing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172; *accord Pennsylvania Bureau of Correction*, 474 U.S. at 40.

The obligation of the City of Yonkers under the Constitution of the United States to remedy violations of civil rights is paramount. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Brown v. Board of Educ. II*, 349 U.S. 294, 300-01 (1955). The fact that petitioners were not parties to—and in their words "had absolutely no connection with"—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the All Writs Act.

This court previously has held that the All Writs Act enables a federal court in an exceptional case to exercise its "residual jurisdictional authority" to issue orders against non-parties to a civil rights action in order to vindicate the constitutional rights of existing parties. *See Benjamin v. Malcolm*, 803 F.2d at 53. In *Benjamin*, we affirmed an order of the district court joining, as third-party defendants pursuant to Fed. R. Civ. P. 19(a) and the All Writs Act, state officials who were " 'in a position to frustrate the implementation of a court order' " to alleviate over-crowding in New York City's detention center on Rikers Island. *Id.* (quoting *New York Telephone Co.*, 434 U.S. at 174). In rejection the state's claim that the district court could not assert jurisdiction over state officials under the All Writs Act, we noted that the district court "was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions . . . and of avoiding the delay that would be entailed in the relitigation of those conditions." *Id.* Consequently, we held that exceptional circumstances justified the exercise of jurisdiction under the All Writs Act.

In the instant case, the record indicates that had the district court known from the outset that the Raceway and the Seminary would challenge the designation of their properties for condemnation as "null and void," the Consent Decree would have included a provision requiring that the condemnation proceedings be instituted in federal court,

presumably under the "residual jurisdictional authority" of the All Writs Act. In retrospect, the assertion by the district court of jurisdiction in the first instance over the condemnation of petitioners' properties might have been a better course of action. We certainly would be less troubled by the use of the All Writs Act to initiate the condemnation proceedings in federal court had Judge Sand deemed petitioners to be necessary third parties to the implementation of the Consent Decree in the underlying civil rights litigation. Nevertheless, we must decide the case before us, and as a practical matter we see no reason why it is any less "necessary or appropriate" at this state of the proceedings to invoke the authority of the All Writs Act. *Cf. In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (using All Writs Act to enjoin non-parties from *commencing* actions in state court where such proceedings would "threaten[ ] to frustrate proceedings in a federal action"). Moreover, were we to decide that removal was improper under the All Writs Act, the state court would be faced with a situation in which any order it issued that was inconsistent with the Consent Decree would be subject to the injunctive powers of the federal court under the exception provisions of the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (federal court may not grant injunction against state court "except as expressly authorized by . . . Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (possibility of "conflicting orders from state and federal courts" sufficient to warrant injunctive relief against state court under 28 U.S.C. § 2283). Use of the All Writs Act in this case to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result.

In sum, we agree with the district court that this is indeed an exceptional case. While we too have confidence in the "ability, objectivity, [and] integrity of the state court" to render an appropriate decision in an Article 78 proceeding, the fact remains, as the district court recognized, that "the issues raised [by the Article 78 proceedings] go to the very essence" of the Consent Decree. If this case simply involved ordinary

condemnation proceedings collateral to the implementation of the housing remedy order, that would be one thing. *Cf. Pennsylvania Bureau of Correction*, 474 U.S. at 40 (All Writs Act does not authorize federal court to order United States Marshals "to transport state prisoners from state prisons to the federal courthouse *in the ordinary course of litigation*") (emphasis added). But as the United States has recognized, "[t]he City's condemnation petitions, initiated pursuant to court order, must be seen in the context of the *Yonkers* [civil rights] litigation. The condemnor here is not the City acting in isolation[,] but the City acting at the behest of the court[,] the *Yonkers* plaintiffs and . . . 'the people who have been deprived of opportunities for housing free of racial discrimination.' " Department of Justice Brief at 37 (quoting Judge Sand, Transcript of Proceedings, June 8, 1988).

Despite the City's assurances through its counsel that it would vigorously defend against the Article 78 petitions, we have serious doubts whether a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order, could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "that the positions which the city would be compelled to take in [state court] would be significantly contrary to positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order.

Accordingly, we hold that removal was proper under the All Writs Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d at 384 (affirming issuance of injunction under Anti-Injunction Act

because "issues being litigated in the state court proceedings could not be separated form the issues and relief involved in the federal court suit"). The implementation of that decree takes precedence over petitioners' desire to have the defenses to the condemnation of their properties litigated in state court. *Cf. North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). Given the exceptional circumstances presented here, it is clear that the power of the All Writs Act extended over petitioners who were "in a position to frustrate the implementation" of the Consent Decree. *New York Telephone Co.*, 434 U.S. at 174. If the power exists to issue extraordinary orders under the Anti-Injunction Act and the All Writs Act to prevent the prosecution of state proceedings, surely in this case it also exists to effectuate removal not withstanding the availability of an independent basis for the exercise of jurisdiction under the federal removal statutes. In any event, by removing the Article 78 proceedings to federal court, petitioners are not being deprived of their statutory right to assert defenses to the taking of their properties; they are merely being prevented from litigating those defenses in state court. We conclude, therefore, that because of the significant risk of inconsistent decrees from two courts, it was "necessary or appropriate": for the district court to invoke the residual jurisdictional authority of the All Writs Act.

II. THE MERITS OF THE ARTICLE 78 PETITIONS

A. EDPL

The Raceway and the Seminary contend on the merits that the City failed to comply with the notice, hearing and review requirements of Article 2 of New York's Eminent Domain Procedure Law (EDPL). In its condemnation petitions, the City claimed to be exempt from compliance with the procedural requirements of the statute pursuant to the "emergency situation" provision of EDPL § 206.

Section 201 of the EDPL provides that, "prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public

project and the impact on the environment and residents of the locality where such project will be constructed, shall conduct a public hearing." The hearing must be held on at least ten days prior notice, EDPL § 202, and following the hearing, the condemnor is required, within ninety days, to make findings and a determination of the public purpose to be served by the proposed condemnation. EDPL § 204. The factors to be considered in making such determination and findings include:

> (1) the public use, benefit or purpose to be served by the proposed public project;
>
> (2) the approximate location for the proposed public project and the reasons for the selection of that location;
>
> (3) the general effect of the proposed project on the environment and residents of the locality;
>
> (4) such other factors as [the condemnor] considers relevant.

Id. § 204(B).

A condemnor is exempt from compliance with the provisions of Article 2 of the EDPL when, *inter alia*, "because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article." *Id.* § 206(D). The district court found that "[c]ontrary to the claims of St. Joseph's and the Raceway, the City of Yonkers, in a very real sense, *is* faced with an emergency" (emphasis in original). As the court further explained, "[t]his matter must end" because it is "tearing Yonkers apart and Yonkers is bleeding."

We believe that the district court's factual finding of such an "emergency situation" is amply supported by the record. *See id.* § 207(C)(3), (4) ("scope of the review shall be limited to whether . . . determination and findings were made in accordance with procedures set forth in [Article 2], and

[whether] a public use, benefit or purpose will be served by the proposed acquisition"); *see also Gerges v. Koch*, 62 N.Y.2d 84, 476 N.Y.S.2d 73 (1984) (emergency situation presented by prison overcrowding warranted temporary exemption under New York City's Environmental Quality Review (CEQR) procedures, which parallel provisions of SEQRA, from filing environmental impact statement in order to begin renovation and construction of facilities as remedy for deprivation of constitutional rights of prisoners); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 466 N.Y.S.2d 668 (1983) (same, except pursuant to SEQRA); *City of Yonkers v. Hvizd*, 93 A.D.2d 887, 461 N.Y.S.2d 408 (2d Dep't 1983) (existence of emergency situation endangering public interest warrants application of EDPL 206(D) exemption); *Matter of Village of Malverne*, 70 A.D.2d 920, 418 N.Y.S.2d 93 (2d Dep't 1979) (same). More than two years after the issuance of the Housing Remedy Order and eight years since the commencement of the civil rights action, no housing remedy has been implemented. The public interest cannot wait any longer. We thus agree with the district court that the "1200 people on the waiting list for public housin gin Yonkers have a right to a remedy" and in our judgment any further delay—aside from that which is necessary to address the first amendment claim of the Seminary as discussed in Part II. C. below—would be intolerable.

Appellants maintain that the only emergency in this case is the result of Yonkers own intransigence, and consequently that full compliance with the terms of the statute cannot be excused. We disagree. An assessment of blame regarding the predicament in which Yonkers presently finds itself is quite frankly irrelevant to a determination of whether or not Yonkers is faced with an "emergency situation" under the statute. *Cf. Gerges*, 62 N.Y.2d at 95, 476 N.Y.S.2d at 78 (that municipal officials "might have foreseen and . . . made appropriate provision for . . . resolution" of emergency situation regarding constitutionally inadequate prison facilities "does not negate the existence of the present crisis"). Indeed, the very purpose of the exemption provisions under Article 2 of EDPL is to excuse compliance with the procedural requirements of the statute

when the public interest so requires. *See City of Buffalo Urban Renewal Agency v. Moreton*, 100 A.D.2d 20, 473 N.Y.S.2d 278, 281 (4th Dep't 1984); *see also Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 305 (1986) ("principal purpose of Article 2 . . . is to ensure that [the condemnor] does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose").

Appellants concede that the construction of low income housing in Yonkers required by the Housing Remedy Order would serve a valid public purpose. In addition, as the district court stated, "[t]he process by which the public housing sites designated in the Consent Decree were determined, the notoriety of that press, the review already given to those sites and the continuing review . . . by HUD certainly satisfied the substance of the State law provisions upon which St. Joseph's and the Raceway predicate their claims." *See also Aswad v. City School Dist.*, 74 A.D.2d 972, 425 N.Y.S.2d 896, 898 (3d Dep't 1980) (holding that "substantial compliance" with exemption provisions of section 206 and four factors enumerated in section 204(B) was sufficient to confirm proposed condemnation). We agree that there was substantial compliance with the requirements of the EDPL in this case. During extensive proceedings before the district court, the City's independent planning experts, the court-appointed Outside Housing Advisor, the Municipal Housing Authority and the City's Community Development Agency all participated in a thorough review of the location, distribution and suitability of the designated sites. With regard to the "general effect" of the proposed condemnations "on the environment and residents of the locality," EDPL § 204(B)(3), HUD conducted a preliminary evaluation as part of its ongoing review of the sites and reported to the district court that the housing plan appeared to meet site, neighborhood and environmental standards for public housing. *See generally* 24 CFR § 941.202 (1988).

Consequently, given the undisputed public purpose inherent in the implementation of the Housing Remedy Order

and the nature and extent of the review process, we are convinced that there was a valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL.

B. SEQRA

The New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101 *et seq*., requires the preparation of an environmental impact statement (EIS) by state and local agencies "on any action they propose or approve which may have a *significant effect* on the environment." *Id*. § 8-0109(2) (emphasis added). Pursuant to regulations adopted thereunder, the Department of Environmental Conservation has determined the types of actions having such a "significant effect" ("Type I" actions) for which as EIS must be prepared. 6 NYCRR § 617.12. When an EIS is required, the full panoply of procedures prescribed under SEQRA comes into play. *See* ECL § 8-0109. If, on the other hand, it is determined that the proposed action is one not likely to have a significant effect on the environment ("Type II" action), then such action "do[es] not require [an] environmental impact statement[ ] or any other determination or procedure" under SEQRA. 6 NYCRR § 617.13; *see Jackson* v. *New York State Urban Dev. Corp*., 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304 (1986) ("the heart of SEQRA is the [EIS] process"); *see also* CPLR § 7803(3) (scope of review is limited to whether determination was "arbitrary[,] capricious or an abuse of discretion").

Although appellants concede that the proposed condemnations of the two sites are not type I actions requiring the preparation of an EIS, *see* 6 NYCRR § 617.12(b), they argue nonetheless that an environmental assessment of the proposed condemnations should have been made to determine if there would be a significant impact on the environment. *See* ECL § 8-0109(4); 6 NYCRR § 617.6(a)(1)(i). However, as indicated in Part II. A. above, HUD is in the process of conducting an environmental review of the proposed housing sites pursuant to the National Environmental Policy Act

(NEPA), 42 U.S.C. § 4321 *et seq.* *See* 24 C.F.R. § 941.209(b) (1988); *see also* EDPL § 204(B)(3) (requiring consideration by condemnor of "the general effect of the proposed project on the environment"). Thus, the environmental assessment that appellants seek is in fact taking place.

In any event, we agree with the district court that the proposed condemnations of the Raceway and the Seminary sites are exempt from compliance with SEQRA. The implementing regulations to SEQRA expressly provide an exemption for actions "required to be undertaken pursuant to a judgment or order" and for "actions . . . of any court." 6 NYCRR § 617.2(q)(1), (5). Accordingly, in view of the fact that the City was compelled by a federal court order to institute condemnation proceedings against the subject properties and that there was, as the district court found, a "meticulous inquiry" regarding environmental factors, we conclude that the requirements of SEQRA were satisfied in all respects.

C. The First Amendment

We come finally to the Seminary's challenge to the condemnation of its property on first amendment grounds.[3] In its article 78 petition, the Seminary alleged that "[b]y the inclusion of the subject property in the [Consent Decree] and by the commencement of the condemnation proceeding, [the City] has attempted to regulate the use of church owned property without any compelling public interest and has sought the acquisition of the subject property in violation of . . . the

---

[3] The Seminary also challenges the proposed taking of its property under Article I, § 3, of the New York State Constitution. The Seminary did not make any argument in the district court or in its brief on appeal, however, based specifically on New York law. We thus are afforded no grounds to consider whether New York's "free exercise and enjoyment of religious . . . worship" clause provides any broader protection than the first amendment regarding the City's proposed acquisition of the Seminary site, *cf. Brown v. McGinnis*, 10 N.Y.2d 531, 225 N.Y.S.2d 497 (1962), and proceed therefore to consider just the Seminary's federal constitutional claim.

First and Fourteenth Amendments to the United States Constitution." The Seminary's position is that, because the district court recognized on a number of occasions the availability of suitable alternate sites to the Seminary parcel and repeatedly stated its willingness to modify the Consent Decree should the City designate such an alternate site, no compelling need existed to justify the proposed condemnation of the Seminary's property.

The first amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (first amendment free exercise clause is applicable to states through fourteenth amendment). In order to show that a particular governmental action implicates the free exercise clause, the aggrieved party must show that the challenged action—in this case, the condemnation of church-owned property—would coerce a violation of religious beliefs or would penalize the practice of religion by denying the aggrieved party "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1325 (1988). *See also School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (coercion); *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963) (penalty). The state may, however, justify any such limitation on religious liberty by showing that its action is essential to accomplish an overriding or compelling governmental interest. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046, 1049 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

The Seminary's free exercise challenge to the proposed taking of its property raises an issue which has only very rarely been presented. While the condemnation of church property for public use is not unheard of, *see, e.g., United States v. 564.54 Acres of Land, More or Less*, 506 F.2d 796 (3d Cir. 1974); *Foster v. Herley*, 491 F.2d 174 (6th Cir. 1974); *Kozemchak v. Ukrainian Orthodox Church of Am.*, 443 F.2d 401 (2d Cir. 1971), we are aware of no federal court case in which a

religious organization has challenged the taking of real property on free exercise grounds. The parties in the instant case, however, have discussed at some length a decision of the Colorado Supreme Court, *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973), in which this precise issue was considered, apparently for the first time.

In *Pillar of Fire*, an evangelical sect sought to enjoin a municipal urban renewal agency from condemning a church building said to have unique religious significance. The building was alleged to be *sui generis* and the birth-place of the Pillar of Fire denomination. However, the record contained no findings indicating that the trial court weighed the competing interests of church and state regarding the proposed condemnation. After expressing concern about "direct confrontations of the sort in this case[which] have been avoided because legislatures and administrative bodies have generally accorded *great respect* to religious organizations," 509 P.2d at 1254 (emphasis added), the Colorado Supreme Court remanded the case to the trial court for a full hearing. The court noted that the "loss of the Pillar of Fire [Church] would allegedly go far beyond the incidental burden of having to move to a new location" and, as a result of the competing interests involved, required that on remand a determination be made whether the state had a "substantial interest" in the taking of the alleged birthplace of the Pillar of Fire Church "without a reasonable alternate means of accomplishment" of its plans for urban renewal. *Id.* at 1253-54; *see Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *cf. Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (condemnation of 40-acre tract of farmland owned by church would not substantially interfere with church's school program since more than 900 acres would remain after taking), *cert. denied*, 429 U.S. 887 (1976). Although the Colorado court conceded that church property could be taken by eminent domain for "paramount public use," 509 P.2d at 1254 (citation omitted), the court

nonetheless concluded that the church was entitled to hearing on the merits of its first amendment claim.[4]

In support of its claim of a free exercise infringement, the Seminary, during the June 8, 1988 proceedings before the district court, relied principally on an affidavit of Monsignor Edwin O'Brien, the Rector at St. Joseph's who stated that the Seminary grounds, including the two acres designated for public housing, form an "apron" of quietude surrounding St. Joseph's and contribute to the "atmosphere of quiet reflection" essential to the "academic, spiritual, psychological and pastoral" preparation of young men for their priesthood. Monsignor O'Brien also averred that the two-acre site together with the remaining forty-two acres of church property have been used for religious purposes by the Archdiocese at least since the opening of the Seminary in 1896 and that "the construction of multi-family housing . . . [would] substantially affect our work at St. Joseph's," the only facility in the Archdiocese for the training of new priests.

The district court considered without resolving the question of whether the taking of the Seminary's property would constitute an interference with the free exercise rights of the Archdiocese. Counsel for the Seminary argued before the district court that, because the use of the two acres would substantially affect the work at the Seminary, the condemnation

---

4 On remand, the trial court found that, despite Pillar of Fire's allegations to the contrary, the church property was neither the birthplace nor the mother church of the Pillar of Fire denomination. When the case returned to the Colorado Supreme Court on appeal, the court upheld the trial court's subsequent finding that the church property was not *sui generis* and also cited evidence from the record supporting the state's "weighty and substantial" need for the property. *Denver Urban Renewal Auth. v. Pillar of Fire*, 191 Colo. 238, 552 P.2d 23, 25 (1976). In the court's view, even had Pillar of Fire proven that the church building was *sui generis*, the record now indicated a substantial state interest in the condemnation of the building without an alternate means of accomplishing the urban renewal project. Accordingly, the Colorado Supreme Court affirmed the trial court's decision allowing the condemnation of the Pillar of Fire Church.

of the site would violate the first amendment. He added, however, that that "doesn't mean . . . the church could not agree voluntarily . . . to the use of the property . . ., but [the property] is not going to be . . . willingly subjected to condemnation under this plan." Clearly perplexed by the "varying positions" of the Archdiocese regarding the inclusion of its property as part of the Consent Decree, the district court described the Seminary's claim of religious interference as equivocal: "if there [is] agreement by the Archdiocese with the overall plan, it [would] allow the use of this property, and that would not interfere with free exercise rights; but since the Archdiocese has reservations . . . with respect to the overall plan, it is resisting the taking on free exercise grounds." Nevertheless, the district court assumed the validity of the Archdiocese's claim of religious use of the property and proceeded to balance the competing interests of church and state, finding that the purported constitutional necessity to include the Seminary property into the Consent Decree outweighed the Seminary's first amendment rights.

The Seminary argues on appeal that "while it is very true that a remedy for the proven segregative policies of the City is necessary, it is just as true that the Seminary property is *not* necessary to that remedy." Reply Brief at 22 (emphasis in original). The Archdiocese further contends that the City's refusal to modify the decree because it believed there were no "politically acceptable" alternatives to the Seminary site is hardly a sufficient reason to justify infringement of a first amendment privilege. In the Seminary's view, therefore, the district court's conclusion concerning the compelling need for the Seminary's property was simply not supported by the record.

Appellees respond first by claiming that under *Lyng* the Seminary was unable to show that the condemnation of its property would have a coercive or penal effect on the practice of religion. *See* 108 S. Ct. at 1325. In *Lyng*, members of three Indian tribes in northwest California challenged a United States Forest Service plan to build a paved 75-mile road connecting two towns, Gasquet and Orleans, on a 6-mile stretch of land

located in the Six Rivers National Forest that, *while owned by the federal government*, traditionally had been used by the Indians for religious purposes. The Forest Service commissioned a study of the American Indian cultural and religious sites in the Chimney Rock area of Six Rivers which found that the region was integral to Indian religious ritual, and that "privacy, silence, and an undisturbed natural setting" were necessary to the practice of their religion. *Id.* at 1322. The report accordingly recommended that the roadway not be completed. The Forest Service decided, however, not to adopt this recommendation and proceeded to select a route through the Chimney Rock area as far removed as possible from the archeological and other sites used by the Indians for spiritual activities. Alternate routes specifically were considered and rejected "because they would have required the acquisition of *private land*, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.* (emphasis added).

The Supreme Court in *Lyng* held that nonwithstanding the undisputed severe adverse effects completion of the proposed roadway would have on the practice of the Indians' religion, "[w]hatever rights the Indians may have to the use of the [Chimney Rock] area . . , those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 1327 (emphasis in original) (citation omitted). While recognizing that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment," the Court noted that "[t]his does not and cannot imply that *incidental* effects of government programs, which may make it more difficult to practice certain religions but which have no *tendency* to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 1326 (emphasis added).

Appellees seize upon the first amendment principles considered in *Lyng* in support of their contention that the free exercise clause does not prohibit governmental action that

would substantially interfere with the practice of religion so long as the government's conduct is not actually coercive or penal in nature. We disagree. The *Lyng* Court declined to determine the "exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs." *Id.* The Supreme Court merely held that "whatever" the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land. *Id.* at 1327 (citing with approval *Bowen v. Roy*, 476 U.S. 693, 724-27 (1986) (O'Connor, *J.*, concurring in part, dissenting in part) (distinguishing between government's use of Social Security number in its possession to aid administration of welfare programs and the government's *requiring* individual to provide such information)). Besides, as Judge Lumbard has recognized, the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property. *See Wilson v. Block*, 708 F.2d 735, 742 n.3 (D.C. Cir.) (Lumbard, *J.*, sitting by designation) (distinguishing *Pillar of Fire*), *cert. denied*, 469 U.S. 956 (1983). Incidental burdens on the practice of religion will not suffice to require the state to come forward with a compelling reason justifying its actions. When, as is claimed in this case, however, a proposed governmental action would substantially effect the practice of religion, there exists at least a material issue of fact concerning whether the state has interfered with the free exercise of religion. *Cf. Lyng*, 108 S. Ct. at 1326; *see Wisconsin v. Yoder*, 406 U.S. at 218; *see also Johnson v. Katz*, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 65 (1986) (lack of "material issue of fact" warrants dismissal of Article 78 petition without a hearing); CPLR § 7804(h) (requiring hearing on any "triable issue of fact").

The Seminary's initial willingness to sell the two-acre parcel in January 1988 does not alter our determination that the proposed taking of the Seminary's property raises a significant question under the first amendment. As the district court itself stated, "if[the] taking [of] these two acres [constitutes] an interference with [the] free exercise of a religion[,] that is the case regardless of what the attitude of the church is to the

overall [housing] plan." There is in our judgment an enormous difference between the Archdiocese agreeing to sell its property and the government proceeding to condemn it. We certainly do not take lightly the Seminary's claim of interference with a first amendment right. In any event, the district court assumed for purposes of its decision the validity of the Seminary's claim of religious interference. To have held otherwise, the district court would have had to hold a plenary hearing on the issue. Indeed, since the record before us does not reflect a considered judgment on the religious interference question, we do not preclude the district court on remand from addressing this issue. Nevertheless, we too accept as true for purposes of this appeal the Archdiocese's allegations that the taking of the Seminary site would "substantially affect [the] work at St. Joseph's" and that the site is "essential" to the Seminary's mission. *Cf. Pillar of Fire*, 509 P.2d at 1253-54.

Turning to the question of whether the condemnation of the Seminary's property is essential to achieve a compelling state interest, it is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternate means of accomplishing the state's compelling interest are available. *See Brandon v. Board of Educ.*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also Sherbert v. Verner*, 374 U.S. at 406; *Pillar of Fire*, 509 F.2d at 1253. Consistent with the district court's disposition below, appellees assert that the inclusion of the Seminary property in the Consent Decree is essential to the implementation of the Housing Remedy Order.

We do not agree that this is necessarily so. Although the district court considered the universe of reasonable alternate sites to be limited to those "capable of being utilized in a federal decree [with] a reasonable timetable for implementation," the court also clearly recognized the availability of such sites since it was willing to permit the City to designate a substitute for the Seminary property. Thus, the City's steadfast refusal to propose a modification of the Consent Decree to delete the Seminary site does not provide a sufficient basis to justify

interference with petitioner's first amendment rights. While the City now takes the position that the "framework for remedying the constitutional violation found by the district court cannot be modified simply by substituting sites [because t]here are no politically acceptable alternative," City of Yonkers Brief at 35, the fact remains that political expediency is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right.

Consequently, assuming as we do for purposes of this appeal that the taking otherwise impermissibly burdens the Seminary's free exercise rights, the Seminary is entitled to be heard on the issue whether the taking is necessary to vindicate a compelling state interest. At such a plenary hearing with expert testimony from both sides and in which the competing interests of church and state are fully addressed and the availability of reasonable alternate sites seriously considered, the district court will be able to determine whether the public interest in remedying discrimination can be reasonably accomplished without the taking of the Seminary's property. The point is that on the basis of the existing record before us, we are not in a position to make an intelligent judgment in this matter one way or the other. The protections afforded by the first amendment require at the very least that the Seminary have a full and fair opportunity to have its rights considered in an attempt—consistent with the "great respect" courts accord religious groups—to avoid a direct confrontation between church and state. *See Pillar of Fire*, 509 P.2d at 1254. If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interest might be. *See Lyng*, 108 S. Ct. at 1327-28 ("[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen[; t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices") (citation omitted); *Wisconsin v. Yoder*, 406 U.S. at 215; *Sherbert v. Verner* 374 U.S. at 406-07.

* * *

One final word is in order. The patience exhibited by the district court under enormously trying circumstances is commendable. Judge Sand has always kept sight of the decisive objective in this case: "[t]hat is, to build the [200 units of] housing as quickly as possible in a manner . . . which will enable future generations in Yonkers to look back and say this was the best possible housing in the best possible locations [that could be built] under the circumstances which obtained in 1988." We trust that the district court will find some way to facilitate reconciliation among everyone concerned in this case so that implementation of the first leg of the Housing Remedy Order can begin as quickly, and hopefully as smoothly, as possible.

CONCLUSION

We affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction under the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in every respect except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration consistent with the views expressed in this opinion. The mandate shall issue in 7 days, and it is so ordered.

Affirmed in part, vacated and remanded in part.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent. In my view, the Article 78 proceedings were improperly removed and should be remanded to state court. Accordingly, I would not reach the merits.

The facts respecting the removal are straightforward. The City commenced condemnation proceedings against the

Raceway and the Seminary, as required by the Consent Decree, on April 21, 1988. The Raceway and the Seminary filed answers and, on May 18, 1988, filed Article 78 petitions as well, presumably for protective reasons.[1]

On the morning of May 27, 1988, before any significant action had been taken in state court with respect either to the condemnation or Article 78 proceedings, the district court signed an order to show cause bringing on, later that morning, a motion by the United States in the federal litigation to compel the City to petition for removal of the Article 78 proceedings to the federal district court. The motion was granted, and the City so ordered, later that day. Accordingly, the City filed a petition for removal on section 1441, "defendants," presumably a distinction without a difference), and the Supreme Court has twice held that whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes. *See Chicago, rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954); *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907). In both those cases, as here, a complaining landowner was required by state law to initiate an action to raise objections to condemnation, in which action the landowner was denominated the "plaintiff" by state law. Both cases held the landowner/condemnee was the defendant for federal removal purposes, regardless of state law, and therefore the only party that could remove the case to federal court.

In all candor, given the clear language of the pertinent statutes and the equally clear holdings of two Supreme Court

---

[1] *Compare Piotrowsky v. Town of Genville*, 101 A.D.2d 654, 475 N.Y.S.2d 511 (3d Dep't 1984) (defenses to a taking of property by condemnation properly raised by initiation of separate Article 78 proceeding), *with Town of Cocksackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106 (3d Dep't 1984) (such defenses may be raised by answer in condemnation proceeding). The Raceway and the Seminary posed the same defenses both by answer in the condemnation proceedings and in their separate Article 78 proceedings; the latter also sought to enjoin the condemnation proceedings.

decisions, I do not regard this question as difficult, or even close. Removal is manifestly not warranted by 28 U.S.C. § 1441 (1982 and Supp. IV 1986) or 28 U.S.C. § 1443 (1982). This brings us to the All Writs Act, 28 U.S.C. § 1651(a)(1982). *Cf.* 28 U.S.C. § 2283 (1982) (federal court stay of court proceedings).

Echoing the rationale expressed by the district court, the majority concludes that "because of the significant risk of inconsistent decrees from two courts, it was 'necessary or appropriate' [within the meaning of 28 U.S.C. § 1651(a)(1982)] for the district court to invoke the residual jurisdictional authority of the All Writs Act." The majority notes also that, in light of the history of the underlying federal litigation, the City is likely to be a reluctant and ineffective party to the state condemnation proceedings, whatever assurances it may give to the federal district court in that regard.

In reaching this conclusion, the majority cites and discusses the leading Supreme Court case on this issue, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), but never sets forth the basic rule articulated in that case for a situation where, as in the case of removal, other federal statutes address the issue or situation before the court. That rule is:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Id. at ___, 106 S. Ct. 15 361.

Pennsylvania Bureau of Correction held that the pertinent habeas corpus statute, which stated that the writ should be directed "to the person in whose custody the party is detained," did not authorize direction of the writ to a noncustodian; and that the All Writs Act should not be invoked for that purpose in view of the statute specifically addressed to the situation and making a different provision. *Id.* at ___, 106 S. Ct. at 360-61. The court, added, however:

> There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

Id. at ____, 106 S. Ct. at 361.

When the issue which this court must decide is properly framed in terms of the controlling authority of *Pennsylvania Bureau of Correction*, it is apparent that the removal undertaken below and approved by the majority here was not warranted by the All Writs Act. Whatever the difficulties in the underlying federal civil rights litigation, to which of course the Raceway and the Seminary are not parties, I see no warrant for a preemptive strike upon a state court which had not even begun to consider the eminent domain proceedings pending before it.

Both the district court below and the majority here acknowledge the "ability, objectivity, [and] integrity of the state court." The officers of that state court are, it might be added, sworn to support the Constitution of the United States. U.S. Const. Art. VI, cl. 3. Accordingly, the state court was entitled to a presumption at the outset of the condemnation proceeding that it would proceed with sensitivity to and awareness of the legal and social context in which the

condemnations are occurring.[3] In sum, there was no basis to disregard the "principles of equity, comity and federalism," *see Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181-82 (7th Cir. 1987), which should govern our consideration of this issue.

The authorities cited by the majority in support of removal are easily distinguishable. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), construed the All Writs Act to authorize an appeal of a district court determination that it had jurisdiction over a dispute whose resolution, in the Supreme Court's view, Congress had entrusted exclusively to the Federal Trade Commission. There is no question here that the state court is an appropriate forum to deal with eminent domain proceedings under state law.

The All Writs Act was invoked in *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987), to allow the addition of state defendants in a lawsuit challenging overcrowding in New York City jails where the state was dilatory in accepting transfer of prisoners, thus precluding correction of constitutional violations, and relief could not practically be achieved without the decreed joinder. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), is similar. Again, there is no question here of adding parties in order to achieve an effective remedy. *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), found authority in the All Writs Act to enjoin non-parties from commencing state court actions which would undermine the impending settlement of a multidistrict federal class action, a situation totally afield from the present litigation.

---

3 It was similarly premature to allow removal on the assumption that the City would be a reluctant condemnor when, whatever weight is accorded to that hypothesis, the United States and/or the N.A.A.C.P. could seek to intervene in the State Court proceedings, and it appears likely that such an application would be granted. *See* N.Y. Civ. Prac. L. & R. 1013 (1976); *Bay state Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 434 N.Y.S.2d 66 (4th Dep't. 1980).

Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974), found warrant in an express exception to the Anti-injunction Act, 22 U.S.C. § 2283 (1982),[4] to prohibit defendants in a federal school desegregation suit from pursuing a state court action invoking a state statute expressly designed to frustrate school desegregation, noting the possibility of "conflicting orders from state and federal courts." *Id.* at 384.

Perhaps my colleagues' invocation of the *Swann* decision best highlights my disagreement with the majority's ruling. The defendants who were enjoined in *Swann* were principals in protracted federal school desegregation litigation who initiated state court proceedings likely to result in orders pursuant to state law which would contradict and undermine the desegregation orders of the federal court. Here, on the contrary, the Raceway and Seminary are not parties to the underlying federal civil rights litigation, and invoke only the normal rights under New York and federal law of owners of property designated for condemnation by a public authority. It would, of course, be ludicrous to enjoin the Raceway and the Seminary from participation further in the state condemnation proceedings. Since only such an injunction would put this case on all fours with *Swann*, it is clear that *Swann* provides no authority for the course followed here.

There was no analogue in *Swann*, moreover, to the action of the district court here in removing the Article 78 proceedings from state court, purporting to determine all the substantive issues in that proceeding the same day the removal occurred, and then directing the parties to present a proposed order to the state court, before which the related condemnation proceedings remained pending, reciting that all the substantive issues in the

---

4 22 U.S.C. § 2283 (1982) provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

condemnation proceedings had been decided and the state court should accordingly proceed "to determine the sole remaining issue of valuation."

I am afraid that the fevered and highly publicized situation in Yonkers has led both the district court and my colleagues to a novel and unwarranted application of the All Writs Act which is abusive both of the condemnees and, more importantly, of the most elementary principles of the comity that should exist between federal and state courts. I would not, of course, following *Pennsylvania Bureau of Correction*, rule out the use of the extraordinary residual authority provided by that statute if future circumstances warrant its invocation. In my view, however, its application in the circumstances presented by this record was manifestly premature and improper. I therefore respectfully dissent.

Order Threatening Further Contempt Sanctions Against the City of Yonkers (Sand, J., October 25, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)
Plaintiff,	)
and	)
YONKERS BRANCH -- NAACP, et. al.,	)
Plaintiffs-Intervenors,	) 80 CIV 6761 (LBS)
v.	)
YONKERS BOARD OF EDUCATION, et al.,	)
Defendants.	)

ORDER

On January 28, 1988, this Court approved and entered the First Remedial Consent Decree in Equity (Consent Decree), which was an agreement on implementation of Sections IV (public housing) and VI (long term plan housing) of this Court's May 26, 1986 Housing Remedy Order (HRO). In that Decree, the Seminary (Valentine Street) site was included by the parties as one of seven proposed sites for construction of 200 public housing units outside of southwest Yonkers and the City of Yonkers agreed to acquire the property for such construction.

At the time of entry of the Decree, the parties and the Court believed that the Seminary site was an appropriate site for housing construction and that inclusion of that site in the mix of sites envisioned by the Decree would enhance implementation of the Housing Remedy Order. However,

since that time, circumstances with regard to use of the seminary site for public housing have changed substantially. Although on January 28, 1988, it appeared that the Archdiocese of New York would make its site readily available, it did not do so and subsequently it opposed condemnation of its property by the City. That opposition has led to much litigation and the current circumstances.

On September 22, 1988, the Court of Appeals for the Second Circuit vacated the ruling of this court with regard to the First Amendment claim of the Seminary, remanding the case for a hearing on the issues of whether there was a compelling need to take the Seminary property and, if necessary, whether such a taking would unnecessarily interfere with alleged religious use of the property. Also in its decision, the Court of Appeals requested the Court and the parties to seek accomodation of the competing interests of church and state and expressed hope that the Court would "find some way to facilitate reconciliation among everyone concerned in this case so that implementation of the first leg of the Housing Remedy Order can begin as quickly, and hopefully as smoothly, as possible." Slip op. 44.

In light of the Court of Appeals decision, this Court has sought to determine the availability and suitability of an alternate pubic housing site to replace the Seminary site. The City of Yonkers has chosen not to participate positively in that process. It has taken "no position" on the availability of alternate sites, submitting none to the Court for consideration. In addition, the City has chosen to attack the suitability of the Gramercy site, the one alternate site preliminarily determined by HUD to be appropriate for public housing construction and supported by the plaintiffs.

At the request of the City, this Court held on October 17, 1988 a hearing to determine the suitability of the Gramercy site for public housing construction. At that hearing, the City presented witnesses, submitted documents into evidence and questioned a HUD witness solely in an attempt to discredit the Gramercy site. The City once again refused to submit

alternative sites for the Court's consideration. At the conclusion of such hearing, the Court found the Gramercy site suitable for public housing construction "at this stage of the record." This Court found that the reasons advanced by the City for rejection of the Gramercy site were both "hypocritical and pretextual," rejected the City's cost and planning arguments based on the evidence presented, and ordered the public housing remedial process to proceed with Gramercy tentatively designated as an alternative site to the Seminary.

At the request of the Court, the plaintiff and plaintiff intervenors have briefed the legal aspects of the Court's designation of an alternative site and a timetable for the ongoing public housing request for proposals (RFP) process. The City of Yonkers has not made any post-hearing submission within the time frame established by the Court. The Court has reviewed the submissions of the plaintiff and plaintiff-intervenors.

The Court hereby finds, given the positions of the parties as stated before this Court, that the parties are in agreement that, under current circumstances, the Seminary site should not be used as a site for public housing pursuant to the First Remedial Consent Decree in Equity. The Court further finds that the recent refusal of the City of Yonkers to take any position concerning the availability of alternate housing sites or to participate constructively in the selection of an alternate site confers on this Court the responsibility, with the able assistance of the other parties, to find and approve a suitable site to insure an orderly and meaningful remedial process in this case.

Accordingly, it is hereby ORDERED that:

1) The Seminary (Valentine Street) site be removed as a site for the construction of public housing as set forth in the First Remedial Consent Decree in Equity dated January 28, 1988;

2) Pursuant to this Court's authority under the May 26, 1986 Housing Remedy Order, the Gramercy site be designated as a site for the consturction of public housing;

3) The currently ongoing Request for Proposals (RFP) process between the MHA and HUD shall proceed according to the currently proposed schedule with regard to the following public housing sited: Whitman School, School 4, Helena Avenue, Wrexham Road and Clark Street. All references to the Seminary and Lincoln School sites shall be deleted from this RFP and the RFP shall proceed to issuance as soon as practicable;

4) On or before 80 days from the date of this Order, the City shall have caused the MHA to prepare an RFP from developers for the construction of 58 units (the number of units previously scheduled for construction on the Seminary and Lincoln School sites) of public housing on the Lincoln School and Gramercy sites. The number of units to be constructed on each site shall be determined by the Court following appropriate analysis of the Gramercy site by HUD and the MHA and consulation with the parties. The process for development of such RFP shall be consistent with the process set forth in Sections 6, 7, 8 and 9 of the First Remedial Consent Decree in Equity;

5) If, within 60 days of the date of this Order, the City has not concluded negotiations with the owner(s) of the Gramercy site for sale of that property on mutually agreeable terms, and has not acquired title to that site from such owner(s) the City Manager is directed to immediately initiate eminent domain proceedings against such owner(s) to acquire such property.

6) This Court hereby finds and declares that an emergency exists with respect to the City of Yonkers' need to acquire the Gramercy site and deems applicable in this instance Section 206D of the New York State Eminent Domain Procedure Law which allows a municipality to initiate condemnation proceedings without having followed the EDPL's notice and hearing provisions, i.e., EDPL secs, 201-204. The Court

further finds that the matter of condemning this site for use as public housing has been widely publicized in Yonkers for several weeks and that both the parcel's owner and other interested parties have had ample opportunity to make known any objections both to the City and to this Court. Moreover, the Court finds that an important public purpose, fully justifying the City of Yonkers' use of its eminent domain authority, will be advanced by this taking. The Court notes that HUD has performed and is continuing to perform extensive environmental reviews of the Gramercy site as required by 24 C.F.R Section 941.202 (1988) and that this review satisfies both the provision of EDPL sec. 204(B)(3) and the New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) Sec. 8-0101. The Court further finds that the condemnation is exempt from SEQRA under 6 NYCRR sec. 617.2(q)(1), (5) in that it is an action taken pursuant to express court order.

Failure of the City of Yonkers to adhere to the above-stated terms, conditions and timetable will subject the City to the contempt proceedings. The Court hereby repeats its intention, upon a finding of contempt against the City of Yonkers for violation of this Order or previous remedial orders of this Court, to impose contempt fines on the City to commence at the fine level in existence on September 9, 1988 (i.e., one million dollars per day), when the City last purges itself of contempt, pending compliance.

SO ORDERED

Dated: New York, New York
October 25, 1988

/s/
LEONARD B. SAND
United States District Judge

Order Directing Acquisition of Sites (Sand, J., November 23, 1988)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, and YONKERS BRANCH -- NAACP, ET. AL. Plaintiffs-Intervenors, v. YONKERS BOARD OF EDUCATION, ET. AL., Defendants.	80 CIV 6761 (LBS)

ORDER

On October 25, 1988, this Court ordered that a Request for Proposals (RFP) for development of public housing be prepared for five of the seven sites currently the subject of the RFP process: Whitman School, School 4, Helena Avenue, Wrexham Road and Clark Street. HUD has pointed out that in order for an RFP to be advertised for turnkey development on a preselected site, the Public Housing Authority must have control of the site for the purpose of conveyance to the successful developer. Since the City has control of the Whitman School and School 4 sites, and agreed to make them available for development of public housing in the January 28, 1988 First Remedial Consent Decree in Equity (Consent Decree), site control of those sites is established. The City also agreed in the Consent Decree to obtain control over the Helena

Avenue, Wrexham Road and Clark Street sites, which are privately-owned, utilizing eminent domain if voluntary sale proved unsuccessful. The City has also agreed to "demap" a paper street on the Helena site.

The City has initiated condemnation proceedings against the three privately-owned sites, but title has not yet passed. No issues except the fair market value of the land are presented in the pending condemnation proceedings, and under New York State law a dispute as to the value of property is not an obstacle to the passage of title.

Accordingly, it is hereby ORDERED:

1. That if by the date that the RFP is ready for advertisement titles to the Helena Avenue, Wrexham Road and Clark Street sites have not passed to the City by eminent domain, then for purposes of the RFP, title to each site is deemed to have passed to the City and all impediments to title are deemed removed.

2. The City is to take the Whitman School, School 4, Helena Avenue, Wrexham Road and Clark Street sites available at no cost for use by the developer selected by the Yonkers Municipal Housing Authority and approved by HUD to develop the housing units.

SO ORDERED

Dated: Nov. 23, 1988

New York, New York

/s/
LEONARD B. SAND
United States District Judge

Order of United States Supreme Court Granting Certiorari, Dated March 6, 1989

CERTIORARI GRANTED

87-1965 ZINERMON, MARCUS, ET AL. V. BURCH, DARRELL

88-599 WASHINGTON, ET AL, V. HARPER, WALTER

The motions of respondents for leave to proceed in forms pauperis are granted. The petitions for writs of certiorari are granted.

88-854) SPALLONE, HENRY G. V. UNITED STATES, ET AL.

88-856) CHEMA, PETER V. UNITED STATES, ET AL.

88-870) LONGO, NICHOLAS, ET AL. V. UNITED STATES, ET AL.

The petition for a writ of certiorari in No. 88-854 is granted limited to Questions 1 and 7 presented by the petition. The petition for a writ of certiorari in No. 88-856 is granted limited to Questions 1 and 5 presented by the petition. The petition for a writ of certiorari in No. 88-870 is granted. The cases are consolididated and a total of one hour is allotted for oral argument.

CERTIORARI DENIED

87-521 LEDBETTER, COMMR. ETC. V. TAYLOR, KATHY J.

87-1926 UPPER DARBY TOWNSHIP, ET AL. V. COLBURN, SUE

87-2034 BARBERA, JACQUELINE, ETC. V. SCHLESSINGER, STEPHEN, ETC.

87-2054 O'CONNOR, DENNIS, ET AL. V. ESTATE OF MARILYN CONNERS

87-2120 JORDA, RAYMOND V. CITY OF NEW BRUNSWICK, ETC.

88-576 ARCHIE, BETTY J., ET AL. V. CITY OF RACINE, ET AL.

88-684 MAINE, ET AL. V. EPA, ET AL.

88-796 McINTOSH, TOMMY, ET AL. V. ARKANSAS

88-810 DISTRICT OF COLUMBIA V. PARKER, DONALD, ET UX.

Amended Order of United States Supreme Court Granting Certiorari, Dated March 6, 1989

MONDAY, MARCH 6, 1989

ORDER IN PENDING CASE

88-333 ALABAMA V. SMITH, JAMES L.

The motion for appointment of counsel is granted, and it is ordered that Delores Boyd, Esq., of Montgomery, Alabama, is appointed to serve as counsel for the respondent in this case.

CERTIORARI GRANTED

88-854) SPALLONE, HENRY G. V. UNITED STATES, ET AL.

88-856) CHEMA, PETER V. UNTIED STATES, ET AL.

88-870) LONGO, NICHOLAS, ET AL. V. UNITED STATES, ET AL.

The order granting certiorari in these cases is amended to read as follows:

The petition for a writ of certiorari in No. 88-854 is granted. The petition for a writ of certiorari in No. 88-856 is granted limited to Questions 1 through 5 presented by the petition. The petition for a writ of certiorari in No. 88-870 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-856 (8)

In The

Supreme Court of the United States

October Term, 1988

CORRECTED COPY

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH – NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

JAMES D. HARMON, JR.
Counsel of Record
BOWER & GARDNER
110 East 59th Street
New York, NY 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

61pp

QUESTIONS PRESENTED

1. Whether a district court abuses its power by compelling a local legislator to vote to adopt local legislation in an attempt to remedy violations of the federal constitution where less intrusive means are available.

2. Whether a local legislator is entitled to legislative immunity for his vote on a local ordinance.

3. Whether the First Amendment prohibits a district court from restraining a local legislator from voting on local legislation according to his conscience.

4. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for not voting to implement a consent decree to which he did not consent, and which was agreed to by others only after the district court threatened to impose sanctions for contempt.

5. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for failing to vote in favor of specific legislation implementing a consent decree when the consent decree imposed no such obligation because it explicitly left intact the legislator's right to exercise legislative discretion.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 2
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2
STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 16
ARGUMENT:
I. THE DISTRICT COURT DID NOT UTILIZE THE LEAST INTRUSIVE MEANS 20
A. Remedial Measures Should Be No Broader Than Necessary To Correct A Constitutional Violation 20
B. The District Court Used Unnecessarily Intrusive Means To Compel Compliance With Its Remedial Orders 22
II. COUNCILMAN CHEMA IS ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY FOR HIS LEGISLATIVE VOTE 24
A. The Doctrine Of Legislative Immunity And Its History 25
B. Councilman Chema Performed A Legislative Function By His Vote And Is Entitled To Absolute Legislative Immunity 29
C. The Cases Relied Upon By The Court Of Appeals Are Distinguishable 31
III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS 32

Page

A. The First Amendment Protects Councilman Chema's Right To Speak Freely In The Legislature By Voting 33

B. The District Court's Orders Constituted Compelled Speech 35

C. The District Court's Orders Constituted A Prior Restraint 36

D. The Government Has Failed To Prove That The Restrictions On Councilman Chema's First Amendment Rights Were Justified 37

IV. THE CONSENT DECREE DID NOT BIND COUNCILMAN CHEMA BECAUSE HE DID NOT CONSENT TO IT 38

A. Councilman Chema Was Neither A Party Nor A Privy To The Decree 38

B. The Decree Was Not Consensual 40

C. Councilman Chema Voted Against The Decree 42

D. The Resignation "Alternative" Was A Form Of Coercion 44

V. THE DISTRICT COURT'S ORDER OF JULY 26, 1988 DIRECTING COUNCILMAN CHEMA TO VOTE IN FAVOR OF THE ORDINANCE WENT BEYOND THE TERMS OF THE CONSENT DECREE 45

CONCLUSION 48

STATUTORY APPENDIX A1

TABLE OF AUTHORITIES

Page

CASES

Aitchison v. Raffini, 708 F.2d 96 (3d Cir. 1983)..... 28

Amalgamated Sugar Co. v. NL Industries, Inc., 825 F.2d 634 (2d Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 511 (1987)..... 38

Anderson v. Bessemer City, 470 U.S. 564 (1985) 41

Bond v. Floyd, 385 U.S. 116 (1966) 33, 44

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980)..... 29

Buckley v. Valeo, 424 U.S. 1 (1976) 33

Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961)..... 31, 32

Bush v. Orleans Parish School Bd., 191 F. Supp. 871 (E.D. La.), *aff'd sub nom., Denny v. Bush*, 367 U.S. 908 (1961)..... 31

Califano v. Gautier Torres, Puerto Rico, 435 U.S. 1 (1978)..... 42

Casey v. United States, 276 U.S. 413 (1928)..... 21

Clarke v. United States, 705 F. Supp. 605 (D.D.C. 1988)..... 36

Coffin v. Coffin, 4 Mass. 1 (1808) 30

Democratic Party of The United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981)..... 34

Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983) 28

First National Bank of Boston v. Bellotti, 435 U.S. 765, *reh'g denied*, 438 U.S. 970 (1978)..... 37

Fletcher v. Peck, 6 Cranch 87 (1810)..... 19, 43

Page

Forrester v. White, 484 U.S. 219 (1988) 18, 29

Freeman v. Lamb, 33 A.D.2d 331, 308 N.Y.S.2d 580 (4th Dep't 1970) 43

Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860 (5th Cir. 1985) 38, 39

Gary H. v. Bradley, 831 F.2d 1430 (9th Cir. 1987) 21

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 32

Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) 29

Griffin v. Co. School Bd., 377 U.S. 218 (1964) 31, 32

Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982) 29

Highland Farms Dairy v. Agnew, 300 U.S. 608 (1936) 42

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 37

Jones v. Helms, 452 U.S. 412 (1981) 42

Kamhi v. Planning Bd. of Town of Yorkton, 59 N.Y.2d 386, 465 N.Y.S.2d 865, 452 N.E.2d 1193 (1983) . 18, 30

Karcher v. Daggett, 580 F. Supp. 1259 (D.N.J.), *aff'd*, 466 U.S. 910 (1984) 23

Kilbourn v. Thompson, 103 U.S. 168 (1881) 25, 30

Kneeland v. Luce, 141 U.S. 437 (1891) 38

Kusinich v. Co. of Santa Clara, 689 F.2d 1355 (9th Cir. 1983) 29

Page

Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391 (1979) 17, 25, 26, 27, 28, 29, 30

Lance v. Plummer, 384 U.S. 929 (1966) 42

Litchfield v. Crane, 123 U.S. 549 (1887) 19, 39

Local Number 93, International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1988) 19, 38, 40, 45, 46

Marin v. Foster, 45 N.Y.2d 287, 408 N.Y.S.2d 387, 380 N.E.2d 217 (1978) 43

McKinney v. Alabama, 424 U.S. 669 (1976) 19, 38, 40

Meyer v. Grant, ___ U.S. ___, 108 S. Ct. 1886 (1988) 23, 33, 37

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 35

Milliken v. Bradley, 443 U.S. 267 (1977) ... 16, 20, 31, 32

Minnesota v. Murphy, 465 U.S. 420, *reh'g denied*, 466 U.S. 945 (1984) 42

Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976) 22

National Treasury Employees Union v. Von Raab, ___ U.S. ___, 109 S. Ct. 1384 (1989) 21

Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976) 18, 36, 37

New York State Assoc. for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980) 22

New York Times Co. v. United States, 403 U.S. 713 (1971) 37

Newman v. Alabama, 683 F.2d 1312 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) 21

Page

Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) 35

Patterson v. Colorado, 205 U.S. 454 (1907) 37

People ex rel. Devery v. Cooler, 173 N.Y. 103, 64 N.E. 956 (1903) 43

Powell v. McCormack, 395 U.S. 486 (1969) 34, 44

Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983) 28

Reynolds v. Sims, 377 U.S. 533 (1964) 34

Riley v. National Federation of the Blind, ___ U.S. ___, 108 S. Ct. 2667 (1988) 36

Rizzo v. Goode, 423 U.S. 362 (1976) 20

Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) 46

RRI Realty Corp. v. Village of Southhampton, No. 88-7741, slip op. (2d Cir. Mar. 29, 1989) 46

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *amended on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 406 U.S. 1042 (1983) 20

Sage v. United States, 250 U.S. 33 (1919) 39

Schenk v. United States, 249 U.S. 47 (1918) 37

Sea-Land Services v. Gaudet, 414 U.S. 573 (1974), *reh'g denied*, 415 U.S. 986 (1974) 39

Shillitani v. United States, 384 U.S. 364 (1966) 16, 20

Simmons v. United States, 390 U.S. 377 (1968) 44

Page

Skinner v. Railway Executives' Assoc., ___ U.S. ___, 109 S. Ct. 1402 (1989) 21

Southern Burlington Co. NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) .. 7, 8

Southwest Airlines Co. v. Texas International Airlines, Inc., 546 F.2d 84 (5th Cir.), *reh'g denied*, 550 F.2d 42 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 39

Spence v. Washington, 418 U.S. 405 (1974) 18, 33

Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980) 28

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1939) 39

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 29

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 17, 20

System Federation No. 9 v. Wright, 364 U.S. 642 (1961) 45

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 34

Tenney v. Brandhove, 341 U.S. 367 (1951), *reh'g denied*, 342 U.S. 843 (1951) 18, 25, 28, 30

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) 18, 33

Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1096 (1987) 21

Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 39

Page

Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968) 19, 44

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1978) 19, 43

United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) 42

United States v. Armour & Co., 402 U.S. 673 (1971) 40, 45, 46

United States v. Kroll, 481 F.2d 884 (8th Cir. 1973) 42

United States v. Chema, ___ U.S. ___, 109 S. Ct. 14 (1988) 15

United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988) 15

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 45

United States v. Ward Baking Co., 376 U.S. 327 (1964) 40

United States v. Yonkers Bd. of Ed., 624 F. Supp. 1276 (S.D.N.Y. 1985) 3

United States v. Yonkers Bd. of Ed., 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2821 (1988) 3, 9

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 30, 46, 47

Washington v. Washington State Commercial Fishing Vessel Assoc., 443 U.S. 658, *modified on other grounds*, 444 U.S. 816 (1979) 22

Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977) 21

Page

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1942) 18, 35

Westfall v. Erwin, 484 U.S. 292 (1988) 29

Wooley v. Maynard, 430 U.S. 705 (1977) 33, 35

Wrzeski v. City of Madison, 558 F. Supp. 664 (W.D. Wis. 1983) 34, 35, 43

Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974) 22

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3619 (Mar. 20, 1989) 19, 40

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976) 46

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 6, cl. 1 ..... *passim*

U.S. Const. Art. IV, § 4 ..... *passim*

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 28

Fed. R. Civ. P. 52(a) 3, 41

Yonkers Code, *Zoning*, Chapter 107 46

Charter of the City of Yonkers, art. III, § C 3-1A 3

Page

OTHER AUTHORITIES

A. Koestler, *Darkness At Noon*, 237 (MacMillan 1941 ed.) 21

Black's Law Dictionary, 370 (5th ed. 1979) 40

2 J. Wilson, *The Works of James Wilson* 38 (Andrews ed. 1896) 27

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in THE WORKS OF THOMAS JEFFERSON 322 (P. Ford ed. 1904) 34

T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 47 (14th ed. 1946) 17, 26

1 W. Anson, *The Law And Custom of the Constitution* 160a (rev. 4th ed. 1911) 26

1 W. Blackstone, *Commentaries*, 164 (7th ed. 1775) 26

6 W. Holdsworth, *A History of English Law* 92 (1924) 26

No. 88-856

In The

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH – NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONER

Petitioner, Yonkers City Councilman Peter Chema, respectfully prays that this Court reverse the judgment and decision of the United States Court of Appeals for the Second Circuit entered on August 26, 1988.[1] That

[1] The parties to the proceeding below were Councilmen Peter Chema, Henry Spallone, Nicholas Longo and Edward Fagan, the United States of America, Yonkers Branch – National Association for the Advancement of Colored People (hereafter "NAACP"), City of Yonkers, Yonkers Board of Education and Yonkers Community Development Agency.

judgment and opinion affirmed as to Councilman Chema and the three other councilmen, and affirmed as modified, as to the City of Yonkers, the orders dated July 26 and August 2, 1988 of the United States District Court for the Southern District of New York, directing the councilmen to vote in favor of local zoning legislation, and adjudging them in civil contempt and imposing coercive monetary sanctions and imprisonment if they did not do so.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 856 F.2d 444 (2d Cir. 1988); a copy is reprinted in Exhibit E of the appendix to Councilman Chema's petition for a writ of certiorari. The orders of the United States District Court for the Southern District of New York are unreported; they are reprinted in the Appendix pp. 397-400, 445-47.[2]

JURISDICTION

The Court of Appeals' order was entered on August 26, 1988. Councilman Chema's petition for a writ of certiorari was filed on November 23, 1988, and was granted on March 6, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1), reprinted in the Statutory Appendix hereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. I, § 6, cl. 1; U.S. Const. amend. I; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and

---

[2] References to "Appendix" refer to the Joint Appendix.

Charter of the City of Yonkers, article III, § C 3-1A are set forth in the Statutory Appendix to Councilman Chema's petition for a writ of certiorari. Fed. R. Civ. P. 52(a) is reprinted in the Statutory Appendix hereto.

STATEMENT OF THE CASE

The United States brought this case in 1980, claiming that the City of Yonkers (the "City") and the Yonkers Board of Education had intentionally created or maintained racial segregation in the City's housing and schools. On November 20, 1985, the District Court issued its liability ruling, finding that a concentration of subsidized segregated housing in the Southwest section of the City was "the result of a pattern and practice of racial discrimination" by City officials. *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1373 (S.D.N.Y. 1985). On December 28, 1987, the Court of Appeals affirmed the judgment of the District Court with respect to liability and also affirmed the District Court's remedial order, Appendix pp. 19-34, known as the Housing Remedy Order. *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2821 (1988). Neither the petitioner councilmen nor the City Council (the "Council") were parties to the case.

In January 1988, Councilman Chema began his term as a councilman for the Second District on Yonkers' West Side after having been elected in November 1987. He had previously served two terms as a councilman during 1980-1984, when he represented the First Ward also on the City's West Side, which then contained most of the City's subsidized housing. Appendix p. 506. Councilman Chema has long been an advocate of decent housing for those whom he was elected to represent. For example, during his first term as a councilman, he travelled with some of his constituents by bus to New York City to testify in a civil suit on their behalf. He testified that,

based upon his observations as well as college education in civil engineering, the housing conditions on the West Side were substandard. Appendix p. 506.

None of the court-ordered housing in this case will be built in areas represented by Councilman Chema. Appendix p. 506.

On January 19, 1988, shortly after Councilman Chema took office, the District Court threatened the City with bankrupting fines if it did not comply with its housing remedy order. At that time, there was some question as to whether the City had adopted a housing assistance plan ("HAP") for the City to qualify for federal funds to construct 200 units of subsidized housing. Appendix pp. 171-75. On two previous occasions, the District Court had "deemed passed" two such housing assistance plans, causing the Department of Housing and Urban Development ("HUD") to release $19,760,000 to the City. Appendix p. 174. The third housing assistance plan would have caused the release of $10,184,000 to the City. *Id.* At the hearing, a representative of HUD advised the District Court that the City had already taken steps to "prepare for the 200 units . . . [and] it would appear that they are in compliance." Appendix p. 173. At that time, the District Court perceived that it had only two options:

> There are two techniques by which the court can proceed. It can proceed by deeming things to have been done which it was the obligation in the first instance of Yonkers to do, or it can order Yonkers to do those things.

Appendix p. 175. Without making a finding of fact as to whether the HAP was current, the District Court chose to order the City to adopt a new HAP, and threatened the City with contempt sanctions if the Council failed to do so:

> Yonkers will comply with the housing remedy order or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected

> officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix pp. 176, 182-83.

This extraordinary threat, including the threat to remove elected legislators from office, and the deprivation of their right to travel, had its intended effect. That afternoon, the councilmen present in court announced their intention to adopt a housing assistance plan, Appendix p. 183, and later did so.

During the proceedings on January 19, 1988, the District Court stated that "a consensual resolution to this is preferable to the type of confrontational order which has typified these proceedings," Appendix p. 179, and gave the parties time to arrive at a consent decree. Appendix pp. 184-85. The discussions which led to the Consent Decree nine days later took into account the only alternative described graphically by the District Court:

> I say again to Yonkers, here is the issue in a clear and simple form. It does not deal with any details or niceties with respect to particular sites. It deals with the overall commitment to comply with the orders of the court, and if the Yonkers City Council is not prepared to do that, don't pass the HAP and you will by the process which I have indicated discover that the construction of the housing will go forward but it will go forward under *the most expensive, the most divisive, conditions possible.*

Appendix p. 178 (emphasis added). In the absence of a consent decree, the District Court was prepared "to execute an order which will move this forward." Appendix pp. 184-85.

On January 28, 1988, the City entered into a "First Remedial Consent Decree in Equity" (the "Consent Decree"), the terms of which required the City to take

certain implementing action, including adoption of zoning legislation, which would allow the placement of the court-ordered housing in specified areas:

> The City agrees to adopt, among other things, legislation . . . providing for zoning changes to allow the placement of such developments, *provided, however, that such changes are not substantially inconsistent with the character of the area.*

Consent Decree, ¶17(d), Appendix p. 222 (emphasis added).[3] Councilmen Chema and Spallone cast the two votes against entering into the Consent Decree. Appendix p. 506.

The Housing Remedy Order required the City to develop and implement a plan known as the long term plan for the creation of assisted housing. Appendix p. 30. When negotiations over the long term plan were discontinued, the United States and the NAACP moved to have the District Court enter an order incorporating a long term plan. Appendix p. 245.

On May 16, 1988, the City submitted its opposition to the entry of the long term plan order because the plan was too restrictive, and more flexibility with respect to both the number of assisted units in each development and the architectural integration of those units was needed. Appendix pp. 245-61.

---

[3] Months earlier, the District Court acknowledged its authority to supersede Yonkers' zoning laws. On May 12, 1987, the District Court proposed that the Council adopt a resolution waiving or superseding "any zoning requirements, need for variances or other local governmental approval." Appendix p. 91. The Council declined to adopt such a "waiver" resolution, causing the District Court to observe that a federal court in implementing a housing order may supersede local zoning codes and ordinances. Appendix p. 105. In the context of events leading to acceptance of the Consent Decree, the District Court must have been aware that the Council intended to reserve this authority with respect to zoning.

On June 13, 1988, the District Court issued a Long Term Plan Order which addressed such issues as a legislative package of incentives for developers and the number, distribution and location of court-ordered housing units, as well as affordability and occupancy criteria. Appendix pp. 303-16. The District Court found that the City had not enacted legislation described in paragraph 17 of the Consent Decree, and ordered the City to take certain actions to effect the purposes and terms of the Consent Decree. Appendix pp. 303-16. The Long Term Plan Order did not direct the enactment of legislation in general, or zoning legislation in particular. The order continued to leave discretion with the City with respect to the impact of court-ordered housing on the surrounding area:

> The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

Appendix p. 309. In May, the City retained Abeles Schwartz Associates, a firm with fourteen years of experience in drafting zoning legislation to effectuate court-ordered housing remedies, normally on behalf of plaintiffs. Appendix pp. 331, 338. As of June 21, 1988, the Abeles firm had not yet begun to draft the legislation for the City. Appendix p. 332. Peter Abeles, a principal in the firm, told the District Court that, based upon his experience, an ordinance would not be workable unless it took into account the economic, land use and marketing factors in the particular community, especially in an urban setting such as Yonkers. Appendix p. 331.

Mr. Abeles believed that his mandate was to produce an ordinance "tailor made" to Yonkers. Appendix p. 331. He told the District Court that the 1983 New Jersey Supreme Court decision in *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d

390 (1983) prompted the enactment of about one hundred local zoning ordinances in New Jersey, but that only "a quarter or a third" of those were producing the intended results.[4] Appendix p. 338. The results were especially disappointing in the more developed parts of the state. Mr. Abeles did not want the same fate for the Yonkers ordinance. *Id.*

Concerned with further delay, both the NAACP and the Government wanted the Council to pass a resolution as a sign of its willingness to enact the legislation. Appendix pp. 332-33. The City urged the Court not to order the Council to vote on legislation sight unseen, because such an order would "backfire" and the Council was unlikely to pass such a resolution. Appendix p. 333. The District Court requested that such a resolution be placed before the Council for its action, but the District Court did not order its adoption. Appendix p. 337.

On June 28, 1988, the Council defeated, by a vote of 5 to 1, a resolution put on the agenda at the direction of the District Court, which would have committed the Council to enact the legislation called for by the Consent Decree and the Long Term Plan Order. Appendix pp. 345-46. Councilman Chema voted against this resolution. Appendix p. 346.

Following the defeat by the Council on June 28, 1988, of the proposed resolution, the District Court entered an order, dated June 29, 1988, directing the Department of Justice and the NAACP to submit by July 5th a proposed order "requiring Yonkers to take specific implementing action pursuant to a prescribed time-table, on penalty of a finding of contempt and the imposition of bankrupting fines." Appendix p. 348.

---

[4] In *Southern Burlington Co. NAACP v. Township of Mount Laurel*, 92 N.J. 158, 356 A.2d 390 (1983), the New Jersey Supreme Court held that zoning ordinances that exclude housing for low and moderate income people violate New Jersey's constitution.

On July 5, 1988, the United States and the NAACP submitted a joint motion requesting entry of an order which set forth four specific actions to be taken by the City, among them:

> The adoption, by July 19, 1988, of the necessary zoning legislation to implement § 17 of the First Remedial Consent Decree in Equity and the Long Term Plan Order. . . .

Appendix p. 350. The City opposed the proposed order because it would have directed the Council to adopt the zoning ordinance then being drafted by the Abeles firm, but not yet finished. Appendix p. 351. Rather, the City urged the District Court, as opposed to the Council, to adopt the "necessary changes or additions to the Yonkers zoning ordinance necessary to implement the Long Term Plan Order." *Id.*[5]

The Department of Justice opposed the City's recommendation that the Court, rather than the Council, should act:

> [T]he City Council of Yonkers simply does not want to take any responsibility for carrying out the law.
>
> They want to flout the court's orders. They want to make all kinds of statements in the press and everywhere else about your Honor, about the orders, about what they are not going to do and they want once again to be let out from under having to do anything so they don't have to explain to their citizens why they are doing something or not doing something. . . .We believe that the Court has to send a message to the City. . . .

Appendix p. 361.

---

[5] In support of its position, the City cited that part of the Court of Appeals' decision in which it was held that "it was appropriate and prudent for the court . . . to deem the City to have chosen sites selected by the court if the City failed to meet [a] deadline." *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181, 1237 (2d Cir. 1987).

The NAACP took the position that contempt sanctions were not justified. Appendix p. 370. Furthermore, the NAACP argued that the proposed zoning legislation, which was still being drafted, Appendix p. 376, was flawed for two reasons: first, it provided no process for adjudicating claims of affected property owners and, second, it did not provide that a proposed housing commission have access to the staff of the Yonkers planning board. Appendix pp. 364, 366.

The District Court found "useful" the City's suggestion that the court itself adopt a zoning ordinance, but announced that it was also considering an order creating a commission with specific powers, as well as adopting the Affordable Housing Ordinance (the "Ordinance") along the lines then being drafted by the Abeles firm. Appendix pp. 357-59. Finally though, the District Court simply adjourned the matter until July 26th, making the following observation:

> The problem before this court is not whether it has the power to effect its remedies. It has vast powers. Bankrupting Yonkers is simply one of them.
>
> * * *
>
> The suggestion of the commission, and it is only a suggestion, is not viewed by this court as a retreat from the exercise of power. It is simply an alternative means of accomplishing what is the prime objective. The prime objective is not a civics lecture. I have given too many of those. The objective is to get some housing built.

Appendix pp. 369-70. On July 26, 1988, the District Court chose to force the Council to act, thus making good on its threat made in January to follow "the most expensive, the most divisive" route to the housing remedy. *See* Appendix pp. 397-400.

On July 26, 1988, the District Court considered a draft of the Ordinance which would have permitted the construction of court-ordered housing in areas not permitted by existing zoning laws. The NAACP and the

Government took opposing views concerning whether the creation of a commission or the exercise of the contempt sanction would best effect the purposes to be served by the housing remedy order. The Government sought contempt; the NAACP appointment of a commission. The District Court explicitly framed the commission route which the NAACP advocated:

> When I [Judge Sand] advanced this suggestion I talked about a commission which would take all of the rights, powers, and jurisdiction of the City Council in any and all matters relating to housing pursuant to the housing remedy orders.

Appendix p. 389. With eloquence, conviction and common sense, the NAACP urged the District Court to focus on the need for housing, not vindication, and in the process defended the councilmen's First Amendment rights:

> I just take strong exception at this stage in this lawsuit to the continued invocation of threats of judicial action as opposed to structural change . . . [T]he fundamental need of judicial power in this situation is to ensure rights . . . There is no reason to believe that if the City Council passes this ordinance it . . . will have any significance whatsoever for the City of Yonkers in implementing this order. In fact, it will simply create a precedent that every time you want to do something we should push them to the wall. That is craziness . . . We don't need to pay attention to Henry Spallone. His position on these issues – I assume they're based on principle – have been overruled by this Court. He can continue his opposition. He can continue to speak against the proposals. I'm sure he will and as an American citizen he has a right to do it.

Appendix pp. 389-91. The Government, on the other hand, urged contempt, literally as a means to silence voices from within the Council expressing the interests of their constituents:

> The government and NAACP have a basic disagreement here . . . . We believe that failure of this court to move forcefully right now to take action to make sure its orders are obeyed will only strengthen the opposition, the obstruction, and will basically allow city officials to openly enflame community opposition. It's easy to say that the City Council – let them yell and scream, say what they want, you know words aren't going to hurt you. But here, your honor, the words of language, Henry Spallone or Nick Longo, are more than words. They're rallying cries.

Appendix p. 393. The City advised the District Court that the Council could not consent to the creation of a commission because the Council had no authority to abdicate or delegate legislative powers conferred by state law. Appendix pp. 378, 393. The District Court adopted the Government's position, which the City characterized as "more punitive than remedial," Appendix p. 392, and gave Yonkers five days – until August 1st – to enact the Ordinance (the text of which had not been finalized until that very day, Appendix pp. 380, 382) or face "bankrupting fines." Appendix p. 395.

The District Court ordered the City and the individual councilmen to show cause why they should not be held in contempt if they failed

> to enact, on or before August 1, 1988, the legislative package relating to the long term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long Term Plan Order dated June 13, 1988.

Appendix p. 398.

The July 26, 1988 order further provided that if the City failed to enact the legislative package by August 1, 1988, each councilman "who fails to vote in favor of" the legislation would be fined $500 per day and later imprisoned until the City enacted the legislation or he changed his vote. Appendix pp. 394-95, 398-99.

On July 28, 1988, the District Court stated in a letter to all counsel that the July 26, 1988 order would be satisfied if the Council adopted a resolution, on or before August 1, 1988, committing itself to enact the Ordinance within the minimum time required by state law for public notice and hearing. Appendix p. 401. This modification of the July 26, 1988 order varied the terms of the Consent Decree, however, because it directed the councilmen to vote for the Ordinance as drawn, without regard to whether the Ordinance would create changes substantially "inconsistent with the character of the area." *See* Appendix p. 222.

On August 1, 1988, at a special Council meeting, Councilman Chema voted against adoption of the resolution because the Ordinance did nothing to remedy existing substandard housing for his constituents on the West Side where many minority group members live:

> How can I as an elected official be forced to vote on something that I've never voted on or supported before? I feel my constitutional rights are being violated tonight. I feel we find ourselves in this imbroglio because the judge has turned a deaf ear towards the fact that the remedy is not a remedy that serves the whole city. We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well. As I went through the areas of the city I found that the West, many, many Westsiders in my district wanted to see the areas along the waterfront, along Radford Street, along all the areas that I represent, and along all the West Side, to be fixed up.

Tape recording referred to in Transcript of August 4, 1988, Appendix p. 452.

Councilman Chema was not alone in believing that the Consent Decree could actually have an adverse impact on Yonkers' West Side. Stonewall Odom, who

described himself as an activist from the black community, along with others who shared his views, Appendix p. 186, urged the District Court to consider the impact that the court-sponsored population relocation plan would have on the black community:

> We are asking, your Honor, that you withhold any decision as to housing in the City of Yonkers until we, as the members of the black community, are allowed to have some input into our fate. Your decision in this court affects us and our children. Our children are bussed against their will and we stand a chance of losing our community by simply transferring poor people to the white community from the west side of Yonkers.

Appendix p. 186.

On August 2, 1988, the District Court adjudged Councilman Chema in civil contempt without a hearing, and ordered him to pay a fine of $500 per day and, on the tenth day, to be imprisoned until he purged himself of the contempt by voting in favor of the Ordinance. The District Court also held the City in contempt and levied "bankrupting" fines against it. Appendix pp. 445-50. The District Court acknowledged the unprecedented character of its July 26th order:

> I know of no parallel for a court to say to an elected official, you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote. I find that extraordinary.

Appendix p. 433.

On August 9, 1988, the Court of Appeals denied Councilman Chema's request for a stay of that portion of the District Court's order which required weekly Council votes on the Ordinance. Appendix pp. 499-500. Councilman Chema believed that repeated votes were not in the public interest. Appendix p. 507. In one such voice vote,

Councilman Chema voted against the Ordinance and said:

> I cast my vote in the exercise of my First Amendment right to freedom of speech and to vote. I also cast my vote as a representative of my constituents to give meaning to their First Amendment right to petition the government through their elected officials.
>
> I vote today because I have been ordered to do so. My conscience will not permit me to vote "yes" because I have been ordered to do so.
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution which I believe is the supreme law of the land.

Appendix p. 507.

On August 26, 1988, the Court of Appeals affirmed the judgment of the District Court as to the councilmen and affirmed the judgment, as modified, as to the City. The Court of Appeals set a cap of $1 million a day on the City's fines. It also stayed the issuance of its mandate until September 2, 1988, to permit application to this Court for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988).

On September 1, 1988, this Court granted Councilman Chema's stay application pending the timely filing and disposition of a petition for a writ of certiorari, but denied the City's application for a stay. *United States v. Chem* __ U.S. ___, 109 S. Ct. 14 (1988), Appendix pp. 512-22.

On September 9, 1988, by a vote of 5 to 2, the Council adopted a resolution declaring its intention to pass the Ordinance. Appendix p. 529. The Council reserved the right to seek the District Court's permission to amend the Ordinance to insure that court-ordered housing "shall not be inconsistent with the current character of the neighborhood in which they are to be built." Appendix p. 530. Councilman Chema voted in favor of the resolution.

On September 10, 1988, after the City had paid more than $800,000 in fines, and was facing imminent layoffs of many municipal employees and suspension of essential municipal services, the District Court lifted contempt sanctions against the councilmen and the City. Councilman Chema has personally paid fines totalling $3,500, none of which has been refunded. Appendix pp. 395, 398-99, 557. He was not imprisoned.

SUMMARY OF ARGUMENT

Several important issues which involve the very nature of our system of constitutional representative government are distilled in this case. The District Court, in seeking to remedy violations of the constitutional rights of one class, violated fundamental First Amendment rights of Councilman Chema, intruded upon the legislative immunity of a local legislator, and deprived the electorate of its rights to untrammelled representation.

The law, as the cornerstone of our constitutional system of shared power, is offended when the federal judiciary exceeds the mandate to use the least intrusive means to effect remedial measures.

It is this Court's role to reestablish the proper balance between the exercise of judicial power and individual constitutional rights.

I. A court is obliged to use the "least possible power adequate to the end proposed," including the election of contempt sanctions, to effect its orders, *Shillitani v. United States*, 384 U.S 364, 371 (1966) [*quoting Anderson v. Dunn*, 19 U.S (6 Wheat.) 61, 69 (1821)]. In protecting the Fourteenth Amendment rights of one party, the court must be punctilious in safeguarding the constitutional rights of the other parties. To achieve the mandatory balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 443 U.S. 267, 280 (1977);

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971).

Here, the District Court took the *most* constitutionally intrusive course of action by ordering Councilman Chema how to vote, thereby unnecessarily depriving him of his First Amendment rights and his rights as an elected legislator, and infringing his constituents' rights to unfettered political representation. In so doing, the District Court eschewed alternative, far less intrusive methods, including establishing a "fair housing commission" and superseding Yonkers' existing zoning law, to achieve the end of building affordable, desegregated housing.

II. Councilman Chema is entitled to absolute legislative immunity for his legislative vote. In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 405-06 (1979), this Court held that regional legislators, as well as federal and state legislators, have absolute legislative immunity. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* at 405.

Legislative immunity was "taken as a matter of course by our nation's founders." *Lake Country Estates*, 440 U.S. at 403. It has "its roots in the parliamentary struggle of 16th and 17th century England." *Lake Country Estates*, 440 U.S. at 403. Legislative freedom of speech in England was "a privilege essential to every free council or legislature." T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 47 (14th ed. 1946). By providing absolute legislative immunity for federal, state and regional legislators, this Court, consistent with English common law and history, has found legislative freedom to be of vital importance in enhancing the integrity of the legislative process, insuring legislative independence, thereby protecting the "public good." The "public good" is the securing of representative government and does not warrant the court's assessment of the wisdom of legislative acts in particular cases. *Lake Country Estates*, 440 U.S. at 404-05. Such reasoning is valid and no less applicable to

local legislators and requires that Councilman Chema be accorded absolute legislative immunity.

This Court applies a functional test to determine whether the legislative immunity doctrine is applicable in a particular case. *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988). "[I]mmunity is justified and defined by the functions it protects and serves. . . ." *Id.*, 484 U.S. at ___, 108 S. Ct. at 544. Here, Councilman Chema acted within the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376, *reh'g denied*, 342 U.S. 843 (1951), in voting on the zoning ordinance. The power to enact a zoning ordinance is a legislative function delegated to local legislative bodies by the New York State Legislature, and in voting on the Ordinance, Councilman Chema was exercising state legislative power. *Kamhi v. Planning Board of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983).

III. The District Court violated Councilman Chema's right to free speech by ordering him how to vote and how not to vote. His vote in the legislature was speech protected by the First Amendment because it was a voice vote and, therefore, speech, as well as expressive conduct, *see, e.g., Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), and the message conveyed was core political speech. The District Court's order of July 26, 1988 violated his right to speak freely because it constituted both compelled speech and a prior restraint: it forced him to vote "yes" on the Ordinance, and prohibited him from voting "no". Compelled speech is prohibited by the First Amendment. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 736 (1942). Prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). There was no justification for this curtailment of Councilman Chema's rights.

IV. Councilman Chema was not bound by the Consent Decree because he was neither a party nor a privy to

it. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-530 (1988). He was not a party because he unequivocally established that he did not consent to it by voting against it. Councilman Chema was not a privy because the Council did not adequately represent his individual rights and interests, and because he was entitled to assert his own First Amendment rights, *see McKinney v. Alabama*, 424 U.S. 669, 675 (1976); *Litchfield v. Crane*, 123 U.S. 549, 550-51 (1887), and to be cloaked with the immunity of his office.

Moreover, the "Consent" Decree was not consensual since it was not voluntary: the Court of Appeals found that ". . . Yonkers entered into the Consent Decree . . . only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3619 (Mar. 20, 1989).

Even if the Decree were consensual as to the Council majority, it could not deprive Councilman Chema of his right to vote his conscience in the future because a temporary legislative majority cannot force individual minority legislators how to vote. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978). One group of legislators cannot abridge the individual rights and powers of other legislators. *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, J.).

The Court of Appeals' suggestion that Councilman Chema was not compelled by the July 26, 1988 order to vote in a certain way because he was "free" to resign is patently erroneous. A legislator cannot be coerced into choosing between giving up his constitutional rights or resigning. *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968).

V. Even if the District Court could order Councilman Chema to comply with the Consent Decree, the District Court's July 26, 1988 order did not do so. The order went beyond the terms of the Consent Decree by depriving the Council of its discretion to consider the

impact of zoning changes on the surrounding community, even though the Consent Decree had explicitly reserved this authority in the Council.

ARGUMENT

I. THE DISTRICT COURT DID NOT UTILIZE THE LEAST INTRUSIVE MEANS.

A. Remedial Measures Should Be No Broader Than Necessary To Correct A Constitutional Violation.

As the Court of Appeals correctly recognized, a court is obliged to use the " 'least possible power adequate to the end proposed' " to effect its orders, including the selection of contempt sanctions. 856 F.2d at 454, *citing Shillitani v. United States*, 384 U.S. 364, 371 (1966) [*quoting Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Even when protecting the Fourteenth Amendment rights of one party, the Court must be punctilious in safeguarding the constitutional rights of the other parties. To achieve the mandatory balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

In *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), this Court wrote, "The principles of federalism which play such an important part in governing the relationship between federal courts and state governments [apply] where injunctive relief is sought against those in charge of an executive branch of an agency of state government." *A fortiori*, the same principles apply with respect to injunctive relief directed at a local legislative body or its members.

Several circuits have applied this principle in the context of cases implicating constitutional rights and the remedies for violation of those rights. In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *amended on other grounds*, 688 F.2d

266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), the court, in commenting on its framework for mandating remedial measures, stated, "We should fashion the *least intrusive* remedy that will still be effective." 679 F.2d at 1126 (emphasis added). In *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1096 (1987), the Ninth Circuit ruled that a court "must not require more of state officials than is necessary to assure their compliance with the Constitution." 801 F.2d at 1089. *See also Gary H. v. Bradley*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Newman v. Alabama*, 683 F.2d 1312, 1320 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Finally, a court should avoid "needless confrontation" between the federal judicial power and state or local governments. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

These words evince two salutary constitutional principles: a constructive restraint on the part of the federal judiciary in confronting, when avoidable, the rights of state and local governmental units, and the sound goal of avoiding conflict between competing constitutional rights or privileges.

Our system of government has not adopted the totalitarian principle that "the end justifies the means – all means." Arthur Koestler, *Darkness At Noon*, 237 (MacMillan 1941 ed.). *See also Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("a desirable end cannot justify foul means"). Rather, in the constitutional framework, the means are often the end; even where that is not so, there is a vital interplay between means and ends. "[T]he impairment of individual liberties cannot be the means of making a point," *National Treasury Employees Union v. Von Raab*, ___ U.S. ___, 109 S. Ct. 1384, ___ (1989) (Scalia, J., dissenting), even if the point is to remedy a constitutional violation. *See Skinner v. Railway Executives' Assoc.*, ___ U.S. ___, 109 S. Ct. 1402, ___ (1989) (Marshall, J., dissenting) ("When we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it").

B. The District Court Used Unnecessarily Intrusive Means To Compel Compliance With Its Remedial Orders.

The District Court's July 26, 1988 order, requiring that the councilmen vote in favor of the judge's "legislative package," was unnecessarily intrusive. Indeed, it was the *most* intrusive alternative as to Councilman Chema's rights because, as the Court of Appeals itself suggested, it gave Councilman Chema no alternative but either to vote contrary to his conscience, to resign or to be in contempt. By ordering Councilman Chema how to vote, the District Court unnecessarily deprived him of his First Amendment rights and his rights as an elected legislator (and those of his constituents to unfettered political representation), thus setting the stage for a needless constitutional confrontation.

The desirable end of "getting housing built" could have been accomplished by other means which would not have intruded upon Councilman Chema's constitutional rights and legislative immunities. Two such alternative methods had been recognized, but eschewed, by the District Court in this case: establishment of a "fair housing commission" to carry out the long term housing order, and superseding Yonkers' existing zoning law. Appendix p. 105. There is precedent for use of both mechanisms. Advisory panels or special masters appointed for the purpose of carrying out remedies in Fourteenth Amendment cases are not unusual. In *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976), an advisory panel was utilized. In *New York State Assoc. for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980) and in *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974), a special master was appointed to supervise compliance. Action by the court circumventing a legislative or regulatory body, accompanied by orders to state or local administrative personnel to implement such orders, while less common, is not without precedent. *See, e.g., Washington v.*

Washington State Commercial Fishing Vessel Assoc., 443 U.S. 658, 695, *modified on other grounds*, 444 U.S. 816 (1979); *Karcher v. Daggett*, 580 F. Supp. 1259 (D.N.J.) (3-judge court), *aff'd*, 466 U.S. 910 (1984). Indeed, at earlier stages of this case, the District Court had "deemed" the Housing Assistance Plan to have been adopted, resulting in the release of almost $20 million of federal funds to the City, Appendix p. 174, and, in affirming the Housing Remedy Order, the Court of Appeals held that it was appropriate for the District Court ". . . to deem the City . . ." to have acted in the event that it had failed to do so. 837 F.2d at 1237.

The City took the position below, in fact, that either a commission or court-sponsored changes in Yonkers' zoning ordinance would certainly be far less intrusive than a compelled legislative act. Either would have been less intrusive on Councilman Chema's rights.

The conflict between the governmental interest and Councilman Chema's individual rights in this case is not between the court's interest in having lawful orders or judgments implemented and the Fourteenth Amendment rights of the plaintiff class vindicated (both of which are legitimate ends) on the one hand, and Councilman Chema's rights on the other, but between the *means* used by the District Court of compelling a legislative act, which is speech, and the use of the contempt power to coerce that act, as compared with Councilman Chema's First Amendment rights and legislative immunity privilege. The speech in this case is "core political speech," and the burden on the government to justify its limitation is "well-nigh insurmountable." *Meyer v. Grant*, ___ U.S. ___, 108 S. Ct. 1886, 1894 (1988). The abolition of Councilman Chema's right to speak in this case was neither the necessary nor the appropriate remedy.

The District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the long term housing plan. Rather, the District Court could have used, and thus was required to use, those other means it had at its disposal which are far less intrusive upon Councilman Chema's individual rights

than a dictated vote backed up by the contempt power to achieve the remedial goal of the affordable housing plan.

Contempt was the most drastic, yet a wholly unnecessary, measure available to the District Court to effect the housing remedy. A commission with a proper mandate, court-directed exemption or variance from existing zoning, or court-directed housing without regard to zoning, could have produced the desired housing without exacting retribution from Councilman Chema or the City.

Contempt, as the first rather than the last resort, foreclosed consideration of rational approaches to the problem of avoiding senseless constitutional confrontation. The District Court chartered a deliberate course calculated to be the "most expensive" route, Appendix p. 178, for the City, its elected officials and their constituents in both economic and social terms. Other options were considered only in a most abstract, passing way. In the context of this case, the contempt power was abused because it was the exercise of the greatest power possible in the way least likely to produce the end desired, i.e., housing that benefits the entire community, and most likely to infringe on individual rights.

II. COUNCILMAN CHEMA IS ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY FOR HIS LEGISLATIVE VOTE.

The District Court's "extraordinary" July 26, 1988 order, Appendix p. 433, directing Councilman Chema to vote and how to vote, and its order of August 2, 1988 holding Councilman Chema in civil contempt for casting a legislative vote in the City Council, are invalid because taken together they violate his absolute legislative immunity.[6]

---

[6] Councilman Chema contests the District Court's authority to enter the Order of July 26, 1988. He filed a timely notice

(Continued on following page)

A. The Doctrine Of Legislative Immunity And Its History.

It has long been established that federal and state legislators have absolute legislative immunity. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951). Justice Frankfurter stated in *Tenney v. Brandhove*, 341 U.S. at 377:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, [3 L Ed 162], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

In *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. at 405-06, this Court held that regional legislators

---

(Continued from previous page)

of appeal of the July 26th order, Appendix p. 501, and challenged its validity in the Court of Appeals. Court of Appeals Brief of Peter Chema, p. 2. He was the only councilman to have done so. His right to challenge the underlying order is clear, see *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, ___ U.S. ___, 108 S. Ct. 2268 (1988); *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963); *United States v. Baird*, 241 F.2d 170, 172 (2d Cir. 1957). It was entirely appropriate for Councilman Chema, as a matter of "conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference v. Abortion Rights Mobilization Inc.*, 108 S. Ct. at 2271.

have absolute legislative immunity in adopting a land use ordinance and general plan.

The immunity of legislators has "its roots in the parliamentary struggle of 16th and 17th century England." *Lake Country Estates*, 440 U.S. at 403. The English Parliament attached central importance to legislative freedom of action and expression. The English Bill of Rights of 1688 declared "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament." 1 Wm. & Mary, Sess. 2, c.2, *cited in* 1 W. Anson, *The Law And Custom Of The Constitution* 160a (rev. 4th ed. 1911). The "[p]rivilege of parliament was principally established in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown." 1 W. Blackstone, *Commentaries* 164 (7th ed. 1775). The privilege of free speech and debate in Parliament "enabled it to act freely, to carry on the controversy with the king in a Parliamentary way, and thus to secure a continuous development of constitutional principles." 6 W. Holdsworth, *A History of English Law* 92 (1924). "The privilege of freedom of speech enabled . . . [Parliament] to criticize the conduct of the government and of its agents, and to suggest changes and reforms." *Id.* at 100. Thus, freedom of speech in England was historically "a privilege essential to *every* free council or legislature." T. May, *The Law, Privileges, Proceedings and Usage of Parliament* 47 (14th ed. 1946) (emphasis added).

Legislative immunity was "taken as a matter of course by our Nation's founders." *Lake Country Estates*, 440 U.S. at 403. James Wilson, a member of the Committee of Detail which drafted the Speech and Debate Clause of the United States Constitution, stated:

> In order to enable and encourage a representative of the public to discharge his public trust with fairness and success, it is indispensably

> necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

2 J. Wilson, *The Works of James Wilson* 38 (Andrews ed. 1896).

By recognizing absolute legislative immunity for federal, state and regional legislators, this Court, consistent with the English common law, has held legislative freedom to be of vital importance in preserving the integrity of the legislative process, insuring legislative independence, thereby protecting the "public good." *Lake Country Estates*, 440 U.S. at 404-05.

The Court's reasoning for clothing federal, state and regional legislators with absolute immunity, so firmly entrenched in English common law and history, is equally persuasive and no less applicable to affording such immunity to local legislators. Local legislators are closer to their constituents, act on vital matters of local importance and are more vulnerable to litigation and its deterrent effects to the uninhibited discharge of their legislative duties. The need for Congress or a state or a regional legislative body to act independently and free of interference is neither more nor less than the need for an unimpaired local legislative body. Affording local legislators absolute legislative immunity would ensure effective, independent legislative decision-making, and, thus, inure to the good of the public. Local legislators stand in the same shoes and function no differently than their federal, state and regional counterparts. Indeed, Justice Marshall, in his dissent in *Lake Country Estates*, 440 U.S. at 407-08, recognized:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the

> " 'uninhibited discharge of their legislative duty,' " *ante*, at 405, 59 L Ed 2d at 412, quoting *Tenney v. Brandhove, supra* at 377, 95 L Ed 1019, 71 S Ct 783, applies with equal force whether the officials occupy local or regional positions.

The doctrine of legislative immunity is at the core of our revered system of representative democracy.

The mere threat of suit "may chill legislators in the performance of their duties." *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 7 (2d Cir. 1980) (state legislators are immune from suit under 42 U.S.C. § 1983 for injunctive relief based on their activities within the sphere of legislative activity), *citing Gravel v. United States*, 408 U.S. 606, 617-18, *reh'g denied*, 409 U.S. 902 (1972), and *Tenney v. Brandhove*, 341 U.S. at 377. It is as likely to inhibit a city councilman's decision-making as it is to inhibit federal, state or regional legislators. As with those legislators, the "public good" requires that a city councilman's decision-making not be inhibited by fear of being hailed into court to face imprisonment and fines for the exercise of his legislative responsibility. The judgment appealed from in this case deters local legislators from freely exercising their legislative duties and voting their consciences. Further, the argument for absolute immunity for local legislators such as Councilman Chema is even stronger here than in *Lake Country Estates*, because Councilman Chema is an elected, not appointed, official, and is answerable to the electorate, which is possessed of the power to discourage and correct abuses by voting officials out of office. *Tenney v. Brandhove*, 341 U.S. at 378.

The Third, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have extended absolute legislative immunity to local legislators. *See, e.g., Aitchison v. Raffini*, 708 F.2d 96 (3d Cir. 1983) (municipal council members are absolutely immune from damages under 42 U.S.C. § 1983 for wrongful discharge); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (village board of trustees entitled to absolute legislative immunity in reducing number of liquor licenses in village); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039

(1983) (local legislators have absolute immunity for legislative acts); *Kusinich v. Co. of Santa Clara*, 689 F.2d 1355 (9th Cir. 1983) (local legislators are absolutely immune for enactment of zoning ordinance); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982) (city mayor entitled to absolute legislative immunity for his veto of two zoning ordinances); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (county council members are absolutely immune from liability for zoning ordinance); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (municipal legislators have absolute immunity from liability for zoning amendment).

No Court of Appeals has denied immunity to local legislators since this Court decided *Lake Country Estates*.

B. Councilman Chema Performed A Legislative Function By His Vote And Is Entitled To Absolute Legislative Immunity.

Councilman Chema is entitled to absolute immunity because he acted in a legislative capacity. This and other courts have long applied a functional test to determine whether absolute immunity is applicable in a particular case. In *Westfall v. Erwin*, 484 U.S. 292, ___ n.3, 108 S. Ct. 580, 583 n.3 (1988), this Court, in an opinion by Justice Marshall, stated:

> In determining the propriety of shielding an official from suit under the circumstances, this Court has long favored a 'functional' inquiry – immunity attaches to particular office functions, not to particular offices.

See also Forrester v. White, 484 U.S. at ___, 108 S. Ct. at 642 . . . ("[W]e examine the nature of the functions with which a particular official . . . has been lawfully entrusted. . . . "); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (Virginia Supreme Court, in promulgating the State Bar Code, acted in a legislative capacity and had absolute legislative immunity). As stated by this Court in *Forrester*, 484 U.S. at ___, 108 S. Ct. at 544, "immunity is justified and defined by

the functions it protects and serves. . . ." In *Lake Country Estates*, 440 U.S. at 405-06, this Court did not look at the level of government at which the official served, but whether the official acted in a legislative capacity comparable to that of state legislators.

Casting a legislative vote is certainly within the "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. at 376. *See also Kilbourn v. Thompson*, 103 U.S. at 204 (Speech or Debate Clause immunity applies to voting for a resolution). In fact, this Court, in *Tenney*, quoted from *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), as follows:

> These privileges are thus secured . . . to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; *but will extend it to the giving of a vote.*

Tenney v. Brandhove, 341 U.S. at 373-74 (emphasis added).

The power to enact a zoning ordinance is a legislative function delegated to local legislative bodies by the New York State Legislature. *Kamhi v. Planning Bd. of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Thus, Councilman Chema's vote was truly legislative and constituted an exercise of state legislative power. Therefore, he was entitled to absolute immunity.

The independent performance of the legislative function is ensured by affording Councilman Chema legislative immunity for his debate and vote, as dictated by his conscience, on the political, economic and social issues affecting his constituency. No federal court has the power to direct Councilman Chema to vote, to cast his vote in a particular way, or to sanction him for voting as he saw fit.

C. The Cases Relied Upon By The Court Of Appeals Are Distinguishable.

The cases relied upon by the Court of Appeals, *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) ("Bush I"), *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), *aff'd sub nom., Denny v. Bush*, 367 U.S. 908 (1961) ("Bush II"), *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Griffin v. Co. School Bd.*, 377 U.S. 218 (1964), do not support a contrary result. In *Bush I* and *Bush II, supra*, the court did not, as here, compel the legislators to enact any legislation. The court there did not dictate to any particular legislator how to vote on proposed legislation. In the original action, *Bush I*, the court found that the Louisiana legislature had acted in an administrative, not legislative, capacity in administering the New Orleans public schools and was, therefore, not entitled to legislative immunity. As the court stated:

> There is no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a *legislative* function. It is only insofar as the lawmakers purport to act as *administrators* of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from process than the administrative officials it supersedes. As Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 170, 2 L.Ed. 60: "It is not by the office of the person to whom the writ is directed, but the nature of the

> thing to be done, that the propriety or impropriety of issuing [an injunction] is to be determined." (emphasis in original).

Bush I, 188 F. Supp. at 922.

Milliken did not involve legislative immunity but, as the Court of Appeals recognized, dealt with sovereign immunity. 856 F.2d at 456. *Milliken* supports Councilman Chema's position because it stands for the proposition that remedial measures should be no broader than necessary to correct a constitutional violation. In *Milliken*, the Court stated that "to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects," and that "[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts. . . ." 433 U.S. at 280, n.15.

Finally, the portion of the opinion in *Griffin* relied upon by the Court of Appeals is pure dictum. There is no discussion in *Griffin* of the question of legislative immunity because the issue was not before the Court.

Legislative immunity precludes a court-compelled legislative vote and the imposition of civil contempt sanctions against Councilman Chema.

III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS.

A vote, particularly a voice vote in open public session by an elected legislator, is speech protected by the First Amendment, "a major purpose [of which is] . . . to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), *citing, Mills v. Alabama*, 384 U.S. 214, 218 (1966). The District Court's orders violated Councilman Chema's right of free speech because they constituted both compelled speech and a prior restraint. Consequently, the

July 26, 1988 order and the contempt judgment are invalid.

A. The First Amendment Protects Councilman Chema's Right To Speak Freely In The Legislature By Voting.

It is well-settled that conduct, if sufficiently expressive, will be protected as free speech under the First Amendment. *See, e.g., Spence v. Washington,* 418 U.S. 405 (1974) (displaying the flag with a peace symbol attached is protected); *Tinker v. Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969) (wearing armbands is protected speech); *Wooley v. Maynard,* 430 U.S. 705 (1977) (state's motto on license plate is speech, and right *not* to display motto and thus not to speak is protected).

"Core political speech" involves communication concerning political change. *See Meyer v. Grant,* ___ U.S. ___, 108 S. Ct. 1886, 1891-92 (1988). Councilman Chema's vote concerned an important public issue, and the message he conveyed by his vote was therefore "core political speech." The First Amendment "affords the broadest protection to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes. . . .'" *Buckley v. Valeo,* 424 U.S. 1, 14 (1976), *quoting Roth v. United States,* 354 U.S. 476, 484 (1957). As this Court pointed out in *Bond v. Floyd,* 385 U.S. 116 (1966), the First Amendment protects the most important function of legislators – the ability to discuss their views freely:

> [The government has] no interest in limiting . . . legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.

Id., at 135-36 (footnote omitted).

This "latitude" must include the right to vote freely. Without protection to vote as their consciences dictate, legislators would be unable to fulfill their duty to their constituents. Curtailment of a legislator's right to vote as he wishes interferes with the protected relationship between a legislator and his constituents, and deprives not only the legislator, but also the electorate, of the fundamental constitutional right to vote. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Powell v. McCormack*, 395 U.S. 486, 527 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964).

As Jefferson and Madison wrote 190 years ago:

> . . . for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties toward each other . . . is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be, that the same interchange of sentiment be lawful between him and them as would be lawful among themselves were they in the personal transaction of their own business . . .

T. Jefferson and J. Madison, *Protest to the Virginia House of Delegates* (1797) in THE WORKS OF THOMAS JEFFERSON, 322-23, 325-27 (P. Ford ed. 1904).

A legislator does not lose his First Amendment rights when he enters office. He is not stripped of his fundamental right of free speech when he engages in his legislative activities. "Plaintiff's status as a legislator does not strip [him] of any rights [he] would otherwise enjoy under the First Amendment to speak freely or to speak not at all." *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667

(W.D. Wis. 1988).[7] Indeed, as shown above, the position of a legislator as a spokesman for the electorate, as well as for himself, enhances the already compelling rationale for the constitutional protection of legislative free speech.

B. The District Court's Orders Constituted Compelled Speech.

The July 26, 1988 order which required Councilman Chema to vote for specific legislation constituted compelled speech, which this Court has long held to be violative of First Amendment rights. In *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1942) (refusal to stand and participate in pledge of allegiance is protected speech), the Court held that the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind, and that compelled speech is as much prohibited by the First Amendment as are attempts to prevent or inhibit speech. *See also Wooley v. Maynard*, 430 U.S. at 714 (obliterating patriotic motto on license plate is protected symbolic speech).

The District Court could not compel Councilman Chema how to vote, even if it could enforce the Consent Decree against the City. The Court of Appeals' holding that, notwithstanding the direction to vote "yes", the "council members remain free to express their views on all aspects of housing in Yonkers," 856 F.2d at 444, is constitutionally unacceptable. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas &*

---

[7] The action challenged in *Wrzeski* was a city ordinance that purported to compel city council members to vote "yes" or "no" on proposed legislation, and to prohibit them from abstaining. The District Court's July 26 order was still more repugnant because it purported to compel Councilman Chema to vote "yes" contrary to his best judgment. In *Wrzeski*, the legislators' right of expression was curtailed, but not eliminated, because they could vote for, or against, legislation.

Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986); *Riley v. National Federation of the Blind*, ___ U.S. ___, 108 S. Ct. 2667 (1988). Officially imposed hypocrisy cannot be sanctioned by this Court; the very notion is unworthy of the heirs of Hamilton, Madison and Jefferson. The ambiguous message a "yes" vote and contrary words conveys would give rise to the belief that Councilman Chema had failed to act on his beliefs and convictions, and had changed his theretofore consistent view. *See Clarke v. United States*, 705 F. Supp. 605, ___, No. 88-3190, slip op. at 7 (D.D.C. Dec. 13, 1988). Moreover, the Court of Appeals' statement is so self-evident and so broadly applicable as to be meaningless. In every compelled speech case the unwilling speaker can disavow the statements he is forced to make or actions he is forced to take. This "right" has never been found by this Court to be a satisfactory safeguard of rights of free speech, and it does not sanitize the District Court's violation of Councilman Chema's First Amendment rights, any more than would legislative infringement of free speech.

C. The District Court's Orders Constituted A Prior Restraint.

The District Court's July 26, 1988 order is especially repugnant to the Constitution because it is an unconstitutional prior restraint: it directs Councilman Chema to vote "yes" with respect to the legislation and it restrains him, in advance of the vote, from voting "no," under pain of civil contempt. Indeed, the Government argued that the July 26, 1988 order should be used as a means to silence the councilmen who disagreed with the Ordinance. Appendix p. 393.

Judicial prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 559 (1976). If the threat of subsequent sanctions "chills" speech, *Id.* at 559, then a prior restraint "freezes" it. The main purpose of the First Amendment is "to prevent all

such previous restraints . . . as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *See also Schenk v. United States*, 249 U.S. 47, 51 (1918) (Holmes, J.).

Because prior restraints are so dangerous, the party defending such a restraint has the "heavy burden" of overcoming "a strong presumption against its constitutional validity." *Nebraska Press Assoc.*, 427 U.S. at 415; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). Accordingly, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden . . . such cases may arise only when the Nation is at war," and the speech poses an immediate threat to American lives. *New York Times Co.*, 403 U.S. at 726-27 (Brennan, J., concurring). Here, the circumstances of Councilman Chema's vote do not approach the very high threshold of national security interests and imminent threat to lives to which the narrow exception to the rule against prior restraints may apply. The Government, the NAACP and the District Court have failed to overcome the strong presumption of the prior restraint's invalidity.

D. The Government Has Failed To Prove That The Restrictions On Councilman Chema's First Amendment Rights Were Justified.

Government restrictions on the rights to speak and vote can survive only where, unlike here, the Government proves that the restrictions are justified by an overriding compelling interest and that less restrictive means to protect that interest are not available. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, *reh'g denied*, 438 U.S. 970 (1978).

Because the speech involved in this case is "core political speech," the burden on the Government to justify its limitation or, in this case, abolition, is "well-nigh insurmountable." *Meyer v. Grant*, ___ U.S. ___, 108 S. Ct.

1886, 1894 (1988) (statute which made it a felony to pay petition circulators was unconstitutional). As shown above, the District Court need not have infringed Councilman Chema's First Amendment rights in order to implement the Consent Decree and the Long Term Plan Order. Rather, the District Court had at its disposal means far less intrusive upon Councilman Chema's individual rights than a dictated vote backed up by the contempt power and its threatened deprivation of his liberty and property. The District Court's restrictions on Councilman Chema's rights to speak and vote freely were unjustified.

IV. THE CONSENT DECREE DID NOT BIND COUNCILMAN CHEMA BECAUSE HE DID NOT CONSENT TO IT.

A. Councilman Chema Was Neither a Party Nor A Privy To The Decree.

The Court of Appeals' erroneous holding that Councilman Chema is bound by the January 28, 1988 Consent Decree reverses the principle established by this Court that only a party who had freely consented to a consent decree is obligated by it. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-22, 530 (1986) ("only parties to the decree can be held in contempt for failure to comply with its terms"). *See also Kneeland v. Luce*, 141 U.S. 437, 440-41 (1891) (a stipulation binds only the parties to it). There is no dispute that Councilman Chema voted against the Decree when the Council was asked to approve it in January 1988. Appendix p. 439. There was no consent, no agreement, no meeting of the minds, and no commitment by Councilman Chema to vote for implementing legislation.

Councilman Chema was not a privy to the Consent Decree. A non-party is a privy only if his rights and interests were adequately represented by a party. *McKinney v. Alabama*, 424 U.S. 669, 675 (1976); *Amalgamated Sugar Co. v. NL Industries, Inc.*, 825 F.2d 634, 640 (2d Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 511 (1987); *Freeman v.*

Lester Coggins Trucking, Inc., 771 F.2d 860, 864 (5th Cir. 1985); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.), *reh'g denied*, 550 F.2d 42 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). A party adequately represents the interests of a non-party only if their rights and interests are "identical;" similar or parallel rights and interests are insufficient. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 593-94 (1974), *reh'g denied*, 415 U.S. 986 (1974); *Litchfield v. Crane*, 123 U.S. 549, 550-51 (1887); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d at 864.

A government officer can bind his government agency and its other officers only in matters within the agency's official authority; he cannot bind the other officers in their personal capacities. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1939); *Sage v. United States*, 250 U.S. 33, 37 (1919) (The United States and the Commissioner of Internal Revenue are not privy to a judgment against a tax collector because the suit against the collector is "personal and its incidents, such as the nature of the defenses . . . are different"). A government is not in privity with its citizens when it infringes individual rights of the citizenry guaranteed by the Constitution. *See Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 263 n.7 (1977) (Individual voters were not in privity with their county government where it sought to enforce laws which the voters later claimed violated personal constitutional rights arising from the equal protection clause of the Fourteenth Amendment).

Here, Councilman Chema was not a privy of the Council or the other councilmen because they did not represent his interests as an individual and as an elected representative to speak and to vote freely and to represent Yonkers' Second District. The Council, as an organ of the City government, was concerned with the official interests and obligations of the City when it entered into the Consent Decree; it was not concerned with Councilman Chema's personal First Amendment rights. Even if the councilmen who voted in favor of the Decree had an

interest in protecting their own First Amendment rights, they could not divest Councilman Chema of *his* First Amendment rights because each councilman is entitled to value his rights differently and to make his own determination of whether and how vigorously to assert them. *See McKinney v. Alabama*, 424 U.S. at 675-76 (finding in one action that a magazine is obscene did not conclusively establish the issue of the magazine's obscenity in a subsequent action involving different defendants, because each defendant must be given the opportunity to assess for himself the value and strength of his First Amendment claims). The collective vote of the Council, or the vote of any other councilman, could not strip Councilman Chema of the immunity derived from his office and its legislative function exercised in representing Yonkers' Second District.

B. The Decree Was Not Consensual.

The Council entered into the Consent Decree only after the District Court threatened it with contempt sanctions. A consent decree is, by definition, a decree entered by consent of the parties. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Black's Law Dictionary*, 370 (5th ed. 1979). A court cannot order litigants to settle a case by entering into a consent decree, because such a decree would not be voluntary. "[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local Number 93, International Assoc. of Firefighters*, 478 U.S. at 522. It is the parties' agreement that serves as the source of the court's authority to enter a consent judgment. *United States v. Ward Baking Co.*, 376 U.S. 327 (1964).

Here, the Consent Decree was not voluntary. The Court of Appeals, only four weeks after the decision appealed from, found in a related case that the Consent Decree was entered into only under threat of contempt. ". . . Yonkers entered into the Consent Decree . . . only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of*

Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3619 (Mar. 20, 1989).[8]

The Court of Appeals' finding that Yonkers entered into the Consent Decree only after the District Court had threatened contempt sanctions is well-supported by the record. On January 19, 1988, the District Court threatened the City with bankrupting fines if it did not comply with the housing remedy order:

> Yonkers will comply with the housing remedy order [of July 1, 1987, requiring the city to adopt a housing assistance plan, Appendix p. 150] or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix pp. 176, 182-83. The District Court also threatened that the housing "will go forward under the most expensive, the most divisive, conditions possible." Appendix p. 178.

So intent was the District Court on imposing its will on the councilmen that it threatened to deprive them of their rights. The District Court explicitly threatened to remove the councilmen from office, a power that the District Court did not possess.

> To give federal judges such authority seems not only completely out of place in our federal form of government but it at least comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. Subjecting a state official's tenure of office to the

---

[8] The respondents must accept this finding of the Court of Appeals because it is a finding of fact, and it is not erroneous. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 580-81 (1985).

> discretion of the federal judiciary makes state officers not responsible to the people of the State, but instead to federal judges. . .

Lance v. Plummer, 384 U.S. 929 (1966) (Black, J., dissenting) (Justice Black would grant petition for writ of certiorari to review district court's exercise of the contempt power by directing state official to resign from office). *See also* U.S. Const. Art. IV, § 4; *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1936).

The District Court also deprived them, without any process, of the right to travel outside of the judicial district. *See Jones v. Helms*, 452 U.S. 412, 418-419 (1981) (right to travel is a "fundamental" right protected by the Due Process Clause of the Fifth Amendment); *Califano v. Gautier Torres, Puerto Rico*, 435 U.S. 1, 4 n.6 (1978) ("The constitutional right of interstate travel is virtually unqualified"); *United States v. Albardo*, 495 F.2d 799, 807 (2d Cir. 1974) (conditioning right to air travel upon submission to a frisk by a magnetometer is a form of coercion); *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973) (compelling a person to choose between exercising his Fourth Amendment right and his right to travel constitutes coercion).

Faced with the threat to the City of ruinous bankruptcy and actual restrictions of their personal liberty, a majority of the councilmen capitulated to the District Court's demands and voted for the Consent Decree on January 28, 1988. Under these circumstances, the Consent Decree was not voluntarily adopted because it was the product of the threat of contempt and limitations on the right to travel. *See Minnesota v. Murphy*, 465 U.S. 420, 443, *reh'g denied*, 466 U.S. 945 (1984) (a person is deprived of free choice if he is threatened with a substantial sanction if he refuses to respond) (Marshall J., dissenting).

C. Councilman Chema Voted Against The Decree.

The Court of Appeals erred in holding that Councilman Chema was bound by the Decree, even though he

had voted *against* it. In so holding, the Court of Appeals cited no authority, 856 F.2d at 457, and indeed could not cite any authority. The court's holding is premised upon the untenable proposition that a legislative majority can bind the minority to vote a certain way in perpetuity by the simple expedient of passing legislation purporting to compel the entire legislature to vote that way in the future, thus stripping each minority legislator of the unfettered right to vote as he chooses.

This novel argument violates a fundamental principle of our representative government. A legislature, by enacting legislation, cannot deprive individual legislators of their right later to vote to change that legislation. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 (1977), *reh'g denied*, 431 U.S. 975 (1978). Legislative bodies may not limit the unfettered discretion of their successors to consider legislation. "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, J.). *See also Marin v. Foster*, 45 N.Y.2d 287, 293, 408 N.Y.S.2d 387, 390-91, 380 N.E.2d 217 (1978) ("Elected officials must exercise legislative and governmental powers, within their own sound discretion, as the needs require. Ordinarily they may not so exercise their powers as to limit the same discretionary right of their successors to exercise that power and must transmit that power to their successors unimpaired"); *People ex rel. Devery v. Cooler*, 173 N.Y. 103, 110, 64 N.E. 956 (1903) ("Nothing is better settled in our jurisprudence [than] that one legislature cannot bind the hands or limit the power of subsequent legislatures"); *Freeman v. Lamb*, 33 A.D.2d 331, 333, 308 N.Y.S.2d 580, 582 (4th Dep't 1970) ("a retiring [City] Council may not legislate to limit the power of a successor Council to act"). *See also Wrzeski v. City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) (city ordinance requiring city counsel members to vote "yea" or "nay" on every resolution held invalid).

It is self-evident that a legislative majority cannot pass legislation which purports to bind the individual members of the minority to vote in a particular manner.

D. The Resignation "Alternative" Was A Form of Coercion.

The Court of Appeals' suggestion that any councilman who voted against the Consent Decree could avoid its binding effect by resigning his office is contrary to this Court's principle that one cannot be presented with a Hobson's choice of either giving up one's constitutional rights or incurring a crushing penalty. A Hobson's choice is, of course, no choice at all, and is only a thinly veiled form of compulsion. *Uniformed Sanitation Men Assoc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) (city employees cannot be fired for refusing to waive their right against self-incrimination); *Simmons v. United States*, 390 U.S. 377, 394 (1968) (a defendant need not waive his Fifth Amendment privilege against self-incrimination to invoke his Fourth Amendment right).

Contrary to the Court of Appeals' position, Councilman Chema could not be compelled to choose between surrendering his fundamental constitutional rights to free speech and to vote his conscience, or incurring the "crushing penalty" of giving up the public office to which he was duly elected. *See Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia House of Representatives could not exclude a duly elected representative because he had spoken against the Vietnam War and the draft). Moreover, had Councilman Chema resigned, his constituents would have been deprived of their most basic democratic right to "choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (*quoting* 2 Elliot's Debates 257).

The logical but absurd extension of the Court of Appeals' reasoning is that an elected official is free to express his political views anywhere *except* in the legislative chamber to which he was elected, and in any manner *except* the exercise of the legislative power his constituents entrusted to him.

V. THE DISTRICT COURT'S ORDER OF JULY 26, 1988 DIRECTING COUNCILMAN CHEMA TO VOTE IN FAVOR OF THE ORDINANCE WENT BEYOND THE TERMS OF THE CONSENT DECREE.

The District Court's order of July 26, 1988 to vote for the Ordinance was improper, even if the Consent Decree did bind Councilman Chema, because the order impermissibly changed the terms of the Decree by depriving the Council of its discretion to ensure that the housing would be consistent with the character of the neighborhoods. Contrary to the Court of Appeals' view, the District Court did not merely enforce the terms of the Consent Decree, but instead extended the supposed obligations of the councilmen beyond those imposed by the Consent Decree.

A court can enforce only the terms of a consent decree that the parties explicitly agreed to, and cannot vary the decree by adding, deleting, or altering its provisions. *Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971).[9] Parties enter into a consent decree after carefully negotiating agreement on its "precise terms." *United States v. Armour & Co.*, 402 U.S. at 681.

---

[9] The only exceptions to this rule are inapplicable here. These exceptions are that a court may modify a consent decree over the objections of one of the parties where a change in the law brings the decree's terms into conflict with the statute pursuant to which the decree was entered, or there have been changed circumstances which would frustrate the parties' purposes if the decree were not modified. *Local 93, International Assoc. of Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984); *System Federation No. 9 v. Wright*, 364 U.S. 642, 646-47 (1961). Here, there have not been any changed circumstances or changes in the law.

> [I]t is the agreement of the parties rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.

Local Number 93, International Assoc. of Firefighters, 478 U.S. at 522. The scope of a consent decree should be narrowly construed because to do otherwise implicates due process rights.

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written.

United States v. *Armour & Co.*, 402 U.S. at 682.

The Ordinance was primarily a zoning ordinance. It explicitly amended Yonkers' existing zoning ordinance, Yonkers Code, *Zoning*, Chapter 107, Appendix p. 532, and made substantive zoning changes to increase land use densities, for example, *Id.* at 534, notwithstanding any provision of the existing zoning law to the contrary. *Id.* at 548. "[Z]oning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring), *reh'g denied*, 429 U.S. 873 (1976) [*quoting Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)]. *See RRI Realty Corp.* v. *Village of Southhampton*, No. 88-7441, slip op. (2d Cir. Mar. 29, 1989) (federal courts are not to become zoning boards of appeals); *Rogin* v. *Bensalem Township*, 616 F.2d 680, 698 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) ("local political bodies are better able than federal courts to assess the benefits and burdens of [zoning] legislation").

The Consent Decree preserved in the Council the right to adopt only zoning changes that "are not substantially inconsistent with the character of the area." Appendix p. 222. The Ordinance, on the other hand, gave the power to consider the impact of zoning changes on the surrounding community to the Office of Implementation and the Yonkers Planning Board. The Council never agreed to give up its discretion. *Compare* Appendix p. 222 *with* Appendix pp. 549-56.

The District Court deprived the councilmen, without their consent, of their traditional police power, explicitly reserved to them in the Consent Decree, "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. at 9.

The Court of Appeals was wrong when it framed the issue as one involving an obligation undertaken and later repudiated. 856 F.2d at 457. By removing all discretion from the Council, the July 26, 1988 order went so far beyond the Consent Decree that the invocation of the contempt power to coerce the enactment of the legislation was improper.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Dated: New York, New York
April 21, 1989

Respectfully submitted,
BOWER & GARDNER

Attorneys for Councilman Chema

By: JAMES D. HARMON, JR.
Attorney of Record
110 East 59th Street
New York, NY 10022
(212) 751-2900

Of Counsel

BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

STATUTORY APPENDIX

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

Fed. R. Civ. P. 52(a)

. . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

Nos. 88-854, 88-856, 88-870

FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

HENRY SPALLONE; PETER CHEMA; NICHOLAS LONGO and EDWARD FAGAN,

Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT YONKERS BRANCH, NAACP, ET AL

GROVER G. HANKINS
NAACP Special Contribution Fund
4805 Mt. Hope Dr.
Baltimore, MD 21215
(301) 358-8900
Attorney for Petitioner

On the Brief:
MICHAEL H. SUSSMAN
SUSSMAN & SUSSMAN
30 South Broadway #418
Yonkers, NY 10701
(914) 968-4558

Dick Bailey Printers. 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

38 pp

TABLE OF CONTENTS

Pages

Table of Authorities ii

Statement of the Case 1

Summary of the Argument 13

Argument

A. The District Court Had The Authority To Enforce Its Orders, Including The Imposition Of Contempt Sanctions Against Petitioners 16

B. The District Court Had No Less Intrusive Alternative 19

C. The Doctrine of Legislative Immunity Does Not Control This Case 21

D. Petitioners Have No Independent First Amendment Right Which Permits Them to Violate This Court Order 27

E. The Long Term Ordinance Was Fully Consistent With The Consent Decree 30

F. The Consent Decree Was Fully Consensual.....30

Conclusion 31

TABLE OF AUTHORITIES

Case *Page*

Bond v. Floyd, 385 U.S. 16 (1966).....29

Boos v. Barry, 99 L. Ed. 2d 333 (1988).....28

Bruce v. Riddle, 631 F. 2d 272 (4th Cir. 1980).....22

Bush v. Orleans Parish School Board, 191 F. Supp. 871 (E.D. La.), *aff'd sub nom Denny v. Bush*, 367 U.S. 908 (1961).....22

Butz v. Economou, 438 U.S. 478 (1978).....16

Delaware Valley Citizens v. Commonwealth of Pennsylvania, 678 F. 2d 470 (3rd Cir. 1982).....16,17,18

Eastland v. United States Servicemen's Fund, 423 U.S. 491 (1971).....21

Gary W. v. State of Louisiana, 622 F. 2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).....20

Gates v. Collier, 616 F.2d 1268 (5th Cir. 1980), *reh'g granted*, 636 F.2d 942 (1981).....18,20

Gates v. Marino, 106 A.D. 2d (2d Dept. 1984).....21

Gravel v. United States, 408 U.S. 606 (1972).....26

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).....25,26

Hutto v. Finney, 437 U.S. 678 (1978).....18,26

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).....22,23

Local Number 93 v. City of Cleveland, 106 S. Ct. 3063 (1986).....17,18

Meyer v. Grant, __ U.S. __, 108 S. Ct. 1886 (1988).....28

Milliken v. Bradley, 433 U.S. 267 (1977).....26

Nebraska Press Association v. Stuart, 423 U.S. 1319 (1975).....26

New York Times Company v. Sullivan, 376 U.S. 254 (1964).....29

Owens v. City of Independence, 455 U.S. 622 (1980).....24

Regal Knitwear Company v. N.L.R.B., 588 F. Supp. 664 (W.D. Wisc. 1983).....17

Shillitani v. United States, 384 U.S. 364 (1966).....19

Shuffler v. Heritage Bank, 729 F. 2d 1141 (9th Cir. 1983).....19

Spain v. Mountanos, 690 F. 2d 742 (9th Cir. 1982).....20

Star Distributors Ltd. v. Marino, 613 F. 2d (2d Cir. 1980).....22

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980).....21

Taylor v. Haynes, 418 U.S. 488 (1974).....29

Tenney v. Brandhove, 341 U.S. 367 (1951).....21,23

Thomas v. City of Evanston, 636 F. Supp. 587 (N.D. Ill. 1986).....17

United States v. Chicago Board of Education, 567 F. Supp. 272 (N.D. Ill. 1983).....16

United States v. City of Miami, 664 F. 2d 435 (5th Cir. 1982).....18

United States v. Nixon, 418 U.S. 683 (1974).....26

United States v. United Mine Workers, 330 U.S. 258 (1947).....16

United States v. Yonkers Board of Education, 624 F. Supp. 1276 (S.D.N.Y. 1986) *aff'd* 837 F. 2d 1181 (2d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 2821 (1988).....1

United States v. Yonkers Board of Education, 635 F. Supp. 1577 (S.D.N.Y. 1986) *aff'd in all respects*, 837 F. 1181 (2d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 2821 (1988).....2

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 108 S. Ct. 2268 (1988).....14

Wrzeski v. City of Madison, 558 F. Supp. 664 (W.D. Wisc. 1983).....28

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, sec. 6, cl. 1.....3

U.S. Const. amend. I.....26

U.S. Const. amend. XIV 24

STATUTES, REGULATIONS and RULES

42 U.S.C. sec. 1983.....15

42 U.S.C. sec. 5301 *et seq.*.....7

N.Y. Pub. Off. Law sec. 2 (McKinney 1988).....13

OTHER AUTHORITIES

Hamilton, Madison & Jay, *The Federalist Papers,* 50 Mentor Books, 1961 29

In The
Supreme Court of the United States
October Term, 1988

HENRY SPALLONE; PETER CHEMA; NICHOLAS LONGO and EDWARD FAGAN,

Petitioners,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT YONKERS BRANCH, NAACP, ET AL

---

1. STATEMENT OF THE CASE

This matter comes before the Court during remedial stages of an acrimonious and bitter lawsuit involving segregation of residential patterns and schooling in Yonkers, New York.

For several decades, black and Hispanic residents were intentionally segregated by the acts and omissions of the Yonkers City Council and the Yonkers Board of Education. The district court's liability opinion in *United States v Yonkers Board of Education,* 624 F.Supp. 1276 (S.D N.Y 1985), *aff'd* 837 F.2d 1181 (2d Cir. 1987), *cert. denied,* __U.S.__, 108 S. Ct. 2821 (1988) outlines in detail the pattern and practice of conduct these elected council members followed. These acts and omissions were gross; overtly and intentionally racist and represented capitulation by Yonkers politicians, including several now before this court, to the community will. This rampant majoritarianism trespassed the constitutional and civil

rights of racial minorities and the courts have so held.[1]

While the current petitioners do not directly challenge these judicial findings, each seeks in one or another way to ignore their clear import—that the class represented by plaintiff-intervenors is entitled to a prompt remedy of these segregative practices as a matter of first moment—and that federal courts have broad equitable authority, as well as solemn responsibility, to ensure provision of such relief.[2]

In May 1986, after a remedial hearing at which defendant City of Yonkers was represented, the district court entered a Housing Remedy Order (herinafter "HRO") (A-19-34) which provided, *inter alia* (a) that within ninety days, the City of Yonkers would submit to HUD suitable sites for the location of 200 units of public housing (A-26-28) and (b) that by November 15, 1986, the City would develop and submit to the court a long term housing plan (A-30-31).[3] *United States v. Yonkers Board of Education*, 635 F.Supp. 1577 (S.D.N.Y. 1986), *aff'd in all respects*, 837 F.2d. 1181 (2d Cir. 1987), *cert. denied*, __U.S.__,

1. The district court so held after a ninety-two day trial in which the primary focus (on the housing side of the case) was the actions of the Yonkers City Council. That body repeatedly vetoed suitable sites for assisted housing in white neighborhoods and refused to accept section 8 existing housing certificates for families out of fear of minority mobility into white neighborhoods. Numerous city council members testified at trial, either through deposition or courtroom appearances.

2. The district court granted the NAACP's motion to intervene in June 1981 and the following year found the Branch and Charlotte Ryer, a black parent who resided in subsidized housing, to be adequate representatives of the class of those discriminated against in both spheres of social life. No party appealed either order.

3. As this Court has expressly provided, during the remedial proceedings, the district court gave defendants the initial opportunity to devise a remedy plan. Thus, within one month of issuing its liability opinion, the district court held a conference at which it allowed defendants two months to submit their proposals. The City's proposal, reflecting the thinking of its council members, abdicated all responsibility for a remedy and threw the responsibility for devising a remedy back to the plaintiffs and the district court. For instance, the City proposed using two sites for the 200 units of public housing it promised HUD it would build as early as 1981. The city submitted these sites despite the fact that HUD already had rejected both as not advancing the objective of providing integrated residential opportunities for potential residents of public housing.

108 S. Ct. 2821 (1988).[4]

Though it failed to obtain a stay of the HRO from either the district court; the Second Circuit or this Court, the City acted as if a stay had been entered and refused to comply with its express terms. Thus, the City Council failed to submit suitable sites for the location of 200 units of public housing. This inaction triggered operation of Section V. of the HRO in which the district court had pre-selected several "back-up" sites for submission to HUD in the event the City Council failed to do so. (A-28-29). Likewise, in November 1986, the City Council refused to submit a long-term housing plan, clearly violating Section VI of the HRO. (A-30-31). The refusal came in the form of a one-page letter from counsel for the City simply relating the City Council's unwillingness to comply.

In late November-December 1986, both plaintiffs, the United States and the Yonkers Branch, NAACP, et. al. (hereinafter "NAACP"), representing the class of black and Hispanic persons currently occupying and eligible for occupancy in assisted housing, moved to hold Yonkers in contempt of court. In addition, the NAACP requested that the district court exercise its equitable authority and appoint a Master to perform remedial tasks which Yonkers refused to discharge , i.e., the designation of additional sites for the placement of public housing and the development of the long term housing remedy plan.

In February 1987, the district court required Yonkers to employ an "Outside Housing Advisor" (hereinafter "OHA") to identify additional sites for the first 200 units of public housing and to draft a long term housing plan for the City. *See*, A-28, Sec.IV. (f). Initially, the OHA held a dual role-working

---

4. Yonkers' appeal, rejected in toto by the Court of Appeals for the Second Circuit in December 1987, dealt with issues of liability and remedy. In mounting this appeal, the City did not contest as clearly erroneous *any* finding of fact entered in the district court's 600 pages decision.

with the City of Yonkers and assisting the court as its expert.[5]

Through the spring and summer of 1987, the OHA located publicly-owned parcels upon which the initial public housing units could be placed. Repeatedly, the Yonkers City Council refused to manifest any good faith. Instead, it continuously stalled the remedial process. For instance, on April 21, 1987, the Council tentatively expressed support for the placement of 200 units on at least 8 sites, *provided that* local neighborhood groups would control tenant selection; no implementation of the remedy would proceed until Yonkers had exhaused all its appellate rights and the long term housing plan was limited to no more than 200 additional units of assisted housing. (A-39, 65-68). The district court rejected these conditions and an Order the City proposed to modify the HRO to reflect them. (A-71-74).[6]

In June-July 1987, the City Council refused to pass a resolution requesting that Westchester County release its reverter interest in certain vacant land the OHA has found suitable for use in the housing remedy. Cf. A-87-97 and

---

5. By this time, the U.S. Department of Housing and Urban Development (HUD), which is to fund the construction of the 200 units of public housing, had approved four sites: Whitman; School 4; School 30 and Lincoln, for 160 units of public housing. The OHA's immediate task was to identify additional sites for the remaining 40 units and to build consensus within the City Council in support of these sites. Responding to City Council sentiment and in concert with his own views as a planner, the OHA determined that additional sites would more appropriately "scatter" the low income housing units, causing less impact on extant communities. From March-December 1987, the OHA identified numerous sites suitable for the placement of such units. Through 1987, the Yonkers City Council refused to accede to the use of any such site.

6. In appointing the OHA and charging him with developing a long term housing plan, the district court requested that he consider the steps needed to implement such a plan assuming, in the alternative, a requirement for the provision of 200, 400, 600 *or* 800 units of subsidized housing. It was in this context that the City Council conditioned any cooperation regarding public housing to an *a priori* limitation of 200 units of subsidized housing. At the time the Council imposed this condition to further cooperation, the OHA had just begun his work on the long term housing plan.

A-104-108.[7] Instead, the Council continued to condition its compliance with the HRO on new conditions of its own creation. *See, for example,* A-112, comments of Mr. Sculnick, Council for Yonkers.

In short, by every means possible, Yonkers Council members sought to sabotage implementation of the housing remedy.[8] At the same time, the district court showed extraordinary patience, assuring Yonkers that if its City Council did, in good faith, come forward with a workable alternative to the HRO, it could be "sympathetically considered". (A-137-140).

With Yonkers' defiance persisting, the district court ordered the OHA to desist from actively working with the City Council and to serve exclusively as the court's expert in housing matters.

In seeking re-election to the Council in November 1987, three petitioners, Longo; Fagan and Spallone, repeatedly railed against the district court and pledged to do all within their power to resist implementation of the court's remedy orders.[9]

By summer 1987, all parties agreed to a scattered site approach to the location of the 200 units. No party favored the erection of high rise public housing "projects." However, implementation of this less dense approach required identification and control over sites. The City offered no cooperation what-

---

7. On April 21, 1987, the OHA provided the court and the parties with a description of many of these publicly-owned sites (A-48-64). A number of these parcels had been given to Yonkers by the County of Westchester in the early 1960's. The county held reverter interests in them and, arguably, before using them for anything but park purposes (for which none was then being used), the City needed County consent. Yonkers refused to seek this consent and did so only under express court order and then in a manner the district court found calculated to communicate to the county its *lack* of desire to obtain the necessary consent (A-153-167).

8. We note that Longo and Fagan make no mention of any of this contemptuous conduct in their Brief. *See,* p. 4.

9. Three of the petitioners likewise opposed the Council majority's modest efforts in the summer of 1987 to propose an alternative remedy plan to that embodied in the HRO. A-144-147 (see negative votes of Spallone, Longo and Fagan).

soever. Finally, having fruitlessly exhausted the possibility of obtaining site control over numerous publicly-owned parcels in which Westchester County held a reverter interest, in November 1987, the district court requested the OHA to identify suitable privately-held sites. The district court indicated that it contemplated an order requiring Yonkers to condemn private parcels deemed needed to implement the short term remedy order.

In early December 1987, the OHA provided a list of nine privately-owned properties which he deemed suitable for public housing. A planning firm retained by Yonkers commented favorably on a number of these sites, as did the other parties.

On December 15, 1987, the district court ordered Yonkers to show what it had done to implement the housing remedy order (A-171). On December 28, 1987, the Court of Appeals for the Second Circuit upheld Judge Sand's liability decision and remedy order in all respects. 837 F.2d 1181.

Several days before Yonkers was due in court to show what it had done to implement the housing remedy order, the City's newly retained counsel contacted counsel for the United States and the NAACP and offered to engage in settlement discussions. The district court agreed to a one-week delay in the scheduled proceedings (A-179).

As it turned out, for the next two and one-half weeks, the parties engaged in negotiations. On January 19, 1988, the district court convened the prior scheduled return on its order to show cause. By then, Yonkers had failed to adopt a required Housing Assistance Plan (A-173-175). The district court required the City Council to enact such a resolution (A-175). In so proceeding, Judge Sand stated, "The time has come—let me speak colloquially—for an end to the game playing. Everyone in this courtroom knows what is meant by the adoption of a HAP, and what its terms and regulations should be; but let me say further, to regard the HAP and the passage of a HAP as being a statement by all who speak for Yonkers, that there is an acceptance of the obligation to comply with the federal court and that with that goes a good-faith cooperation and participation in the process of implementing the housing remedy order." (A-176). The district court continued, "The issues transcend Yonkers.

They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, then our constitutional system of government fails." (A-177).

Judge Sand indicated that Yonkers would be fined should the Council fail to pass the required legislation (A-177-178). Later that afternoon, counsel for the City advised the court that the City Council had agreed to convene the next day to pass the required legislation (A-183).

On January 25, the parties represented that they had reached an agreement to settle the housing aspects of this protracted litigation.[10] Counsel for Yonkers described the Consent Decree and in most relevant part stated,

> "The Court: I understand that there is some legislation that is contemplated.
>
> Mr. McAmis: Yes, Your Honor, the City will pass legislation to the effect that until the goal (of 800 units of

---

10. Chema (Brief at 4) cites threats made by the district court on January 19, 1988. Seen in context, these comments by Judge Sand represented growing frustration with the pace of negotiations initiated by the City earlier that month. What had occurred was this: in previous years, the City Council had refused to pass a Housing Assistance Plan or HAP, one component of an application for federal Community Development Block Grants. *See*, 42 U.S.C. sec. 5301, *et seq*. During the 1988 negotiations, the United States insisted that as a showing of good faith, the City Council pass the required HAP. When the City Council refused, negotiations bogged down and the parties appeared before the district court on January 19, 1988 in that light. Contrary to Chema's ill-informed suggestion, the City conceded that it had failed to pass the required HAP and the Council had recalcitrantly and knowingly failed to do so.

In this context and with negotiations toward a settlement finally proceeding, the district court reasonably entered its order requiring that members of the Council stay in the jurisdiction.

With regard to Chema's suggestion that it was the district court which sought or escalated controversy, nothing could be further from reality. Rather, 18 months after the City Council had flatly refused compliance with the Housing Remedy Order, the district court continued to hope for and await cooperation. By January 1988, the district court made clear, however, that time was running out for the City and that more coercive and expensive measures would be instituted absent some change in municipal conduct.

affordable housing) is reached, only assisted and private housing that has an assisted component would be permitted in Yonkers . . ." (A-193)

The City's counsel then requested a brief recess to allow the Yonkers City Council to consider and adopt the settlement. The district court agreed.[11] On January 27, 1988, the City Council approved the First Remedial Consent Decree in Equity by a vote of 5-2 (A-216-223).

The Decree committed Yonkers to use three publicly-owned and four privately-held sites for the 200 units of public housing. (Section 2. at A-217).[12] In addition, Yonkers agreed to the central elements of the long term housing plan. Specifically, the City agreed within ninety days to "adopt . . . legislation (a) conditioning the construction of all multi-family housing . . . on the inclusion of at least 20% assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided that such changes are not substantially inconsistent with the character of the area . . .". In addition, Yonkers agreed not to perfect any further appeal of the Court of Appeals' affirmance of the housing remedy order. Section 10, A-219.

Within six weeks, turmoil embroiled the City. Two Council members who voted for the Consent Decree, Longo and Fagan, had run in the 1987 election, as in previous municipal campaigns, on a platform of defying the federal courts. Their changes of position engendered tremendous community hostility and resentment. In addition, citizen groups expressed outrage that the City Council had given away the right to seek certiorari in this Court from the affirmance of the district court's liability

---

11. On January 25, 1988, petitioner Spallone sought to address the district court. Judge Sand responded, "Mr. Spallone, you speak through your counsel." (A-203).

12. Yonkers agreed to purchase these properties through condemnation proceedings, if necessary. Section 4, A-218.

and remedy orders rendered by the Court of Appeals for the Second Circuit. City council meetings became wild spectacles during which no business could be conducted.[13]

In March 1988, less than two months after signing the Consent Decree, the City moved to modify it by deleting Section 17 in which it waived appellate rights. The district court denied this motion. One month later, on May 2, 1988, Yonkers moved to vacate the entire Consent Decree asserting that the support of John Cardinal O'Connor had been material to Yonkers' willingness to enter it and that His Eminence had since spoken negatively about certain aspects of the Decree (A-225-244).[14] Again, the district court denied the City any relief.[15]

Meanwhile, after two initial meetings with counsel for plaintiffs, the City refused to participate in drafting the Long Term Housing Plan, as contemplated in the January Decree. In

---

13. Spallone suggests in his Brief that reciting the lengthy history of racial segregation and official discrimination which continued long after the Consent Decree was signed is "inflammatory and obfuscatory." (Brief at 5, n. 7). We could not disagree more strongly. The district court did not here act in a vacuum, but only after faced with ongoing racial segregation and discrimination implemented by the ongoing conduct of the Yonkers City Council, with Henry Spallone as chief orchestrator. The choice the district court faced was whether to confront directly the contemptuous and highly disrespectful conduct of Spallone and his cohorts or to seek to circumvent them. While the NAACP has always felt that accentuating the madness projected by Spallone was a less desireable approach than strong remedial measures, we certainly believe the approach Judge Sand took to be one characterized by restraint; courage and patience and one fully supported by the law.

14. As Rex Lee, Esq. stated in arguing for the City's Motion to Vacate on May 19, 1988, "The fundamental mistake that was made on the part of all parties was a mistake in assumption as to the approach to the degree of support that would be given to this Consent Degree by the Cardinal and the Catholic Church." (A-265). In presenting this motion, as well as the one to modify the Consent Decree, the City represented the views of the majority of the City Council members and none had his own counsel.

15. The City did not appeal either the order denying its motion to modify or its motion to vacate.

May 1988, plaintiffs were forced to report the City's abdication of this responsibility. The district court ordered that the City experts, a private planning firm, Abelees & Schwartz, complete a draft of this Housing Plan, as required by the Consent Decree, for review by all parties and the court. On June 8, 1988, the district court entertained minor objections to the draft plan, accepting some of the City's suggested changes and rejecting others (A-275-302).[16]

On June 13, 1988, the district court entered the "Long Term Plan Order" (A-303-316), the Second Remedial Decree in Equity, noting that "The City has failed to take those actions which were the subject of Section 17 of the First Decree. The City has further informed the court and the parties that it will not negotiate toward reaching an understanding on certain other long term plan issues, as required by Section 18 of the First Decree." (A-303-04). The next day, the City Council refused to approve the long term order as its own and, instead, adopted Resolution No. 144-1988 which declared a moratorium on all assisted housing developments in Yonkers (A-317-319).

On June 21, 1988, the district court held a conference call to schedule the presentation to the City Council of the legislation necessary to implement the long term remedy order (A-322-344). The court directed that the council adopt on June 28, 1988, its next scheduled meeting, "the provisions of the consent decree and the long term plan." (A-335).

On June 28, 1988, the City Council defeated a resolution to declare its commitment to implement the long term plan (A-348). Instead, the Council resolved to halt condemnation proceedings required to acquire one of the parcels to be used for the 200 units of public housing (A-350). The next day, the district court ordered plaintiffs to devise a timetable for the City's implementation of the long term order at the risk of contempt. The plaintiffs proposed passage of the necessary legisla-

16. As Fagan and Longo concede, the long term plan was "derived from those provisions of the First Remedial Consent Decree in Equity." (Brief at 5). Moreover, the ordinance was written by the City's own planners and approved by counsel for Yonkers (Brief at 6).

tion by July 19. The City of Yonkers opposed plaintiff's proposed Order. The City did not raise any issue concerning legislative immunity, but, rather argued that any requirement by the district court would lead to further confrontation (A-351-52).

On July 12, 1988, the district court held another hearing to consider how to respond to the Council's refusal to endorse the long term housing plan. Judge Sand then broached for comment by the parties the creation of the Yonkers Affordable Housing Commission to replace the municipal zoning and land use apparatus and insure implementation of the housing remedy order.[17]

The City opposed creation of such a commision arguing that it was overbroad and contrary to the powers given by state law to Yonkers. Indeed, Yonkers specifically objected that no power allowed the district court to create a non-representative body to function as a legislature (A-377-379). No petitioner supported creation of the Affordable Housing Commission. Indeed, none offered any comment whatsoever. Only the NAACP supported the proposal, submitting that it properly focused on affecting a meaningful remedy in an expeditious manner.[18]

By late July 1988, the City Council continued to balk at passing the long term housing ordinance. Council members openly discussed their contempt for the district court and stated that their opposition was not so much to any provision of the long term housing ordinance as to the 200 units of *public* hous-

---

17. "All of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan shall vest in the Yonkers Affordable Housing Commission including, but not limited to, adoption of zoning variances, density bonuses and any other actions necessary or appropriate to facilitate construction of said housing." (A-358).

18. Petitioners suggest that the district court failed to adopt a less intrusive alternative when it required adoption of an ordinance the City Council had previously committed to adopt rather than take over municipal operations in the areas of land use and zoning, at least insofar as necessary to assure implementation of the goals set forth in the First Consent Decree. None of the petitioners took this position in the district court, either before July 26, 1988 or at their contempt hearings.

ing.[19]

On July 26, 1988, the district court ordered that the City Council comply with the Consent Decree by passing the long term ordinance within five days or face contempt of court. (A-397-400). Later, after learning that the Council members wished to have a public hearing ten days before voting on the ordinance, the court amended its order to require only that the legislators indicate their intention to adopt a long term ordinance within the minimum time prescribed for notice pursuant to state law (A-401). In fact, the district court made clear that the Council could pass a modified ordinance, so long as they acted and demonstrated some measure of good faith.[20]

The Council refused. On August 1, 1988, by a four to three vote, the Council failed to adopt the ordinance or to indicate a willingness to pass any such ordinance.

On August 2 and 4, the district court provided the council members an opportunity to be heard on why they should not be held in civil contempt and subjected to the previously announced consequences. None presented any justification for his failure to vote for the legislation contemplated by the Consent Decree. None offered to discharge this obligation with regard to a modified ordinance. The plaintiffs showed that the latest example of contempt simply perpetuated years of resistance by these individual council members to the vindication of federal fair housing rights and should be seen as nothing more nor less. The district court found the council members in civil contempt; fined them $500 for each day their contempt continued and

19. Chema distorts this history by suggesting, for instance, that the City's effort to put off votes on the ordinance had something to do with dissatisfaction over *its* terms. (Brief at 8). To the contrary, as the City submitted at the time, disaffection with the locations of the 200 units of public housing had so enveloped the community and the City Council that no action in support of *any* aspect of the Housing Remedy Order was thinkable at the time.

20. Predictably, the City requested that the district court "deem" everything accomplished. In this manner, the City Council would be required to take no positive action curing its constitutional violations and its members could continue to rail against a tyrannical judge who Spallone repeatedly compared to Hitler and Stalin.

reiterated that, after ten days of such contempt, he would order them jailed. In addition, the district court levied a fine of $100/day, doubling each day, against the City of Yonkers.

In light of the legal issues presented, some other factual background appears important. First, neither the United States nor the NAACP ever instituted a civil action against any individual council member under 42 U.S.C. section 1983. Second, under New York law, individual council members are officers of the City, N.Y. Pub. Off. Law §2 (McKinney 1988) and they are bound to obey orders issued by courts of competent jurisdiction. In this particular case, as officers of the City, all City Council members were represented by counsel for the City of Yonkers until sometime after July 26, 1988, when counsel for the City declared that a conflict of interest prevented him from representing the City and the individual council members retained their own counsel.

II. SUMMARY OF ARGUMENT

A district court has broad equitable powers to implement a remedy to match the scope of adjudicated constitutional violations. Here, in the first instance, the district court appropriately permitted defendants to propose remedial measures. They refused. After notice, the district court then conducted extensive remedial proceedings which occasioned entry in May 1986 of the Housing Remedy Order (hereinafter "HRO"). The City of Yonkers, which can legislate only through the City Council, steadfastly refused to implement major aspects of the HRO. Plaintiffs then moved for a citation of civil contempt. Instead, the district court employed an outside advisor to advance implementation of the plan. Still, Yonkers refused to cooperate and effectively delayed implementation. Indeed, through calendar year 1987, the City Council would not identify any sites for public housing and failed to cooperate as the district court sought to assemble suitable sites.

By the summer of 1988, the City Council had demonstrated a contempt for the power of the federal court and for the rule of law. After adoption in January 1988 of the First Remedial Consent Decree in Equity, the Council refused to discharge its terms. Instead, it repeatedly acted to thwart implementation.

Finally, after the City Council refused to adopt *any* long

term housing plan, as squarely required by the Consent Decree, on July 26, 1988, the district court gave the Council members one last opportunity. When they refused to act, the district court held non-compliant members in contempt of court and fined them.

In these circumstances, the district court properly exercised equitable authority. After displaying commendable patience, the district court chose to uphold the rule of law against the excesses of the City council members. In so acting, the district court rejected two alternatives: creating an Affordable Housing Commission or "deeming" the necessary legislation passed. Adoption of either alternative would have been more intrusive on the legislators' authority and more disruptive of local autonomy. No petitioner supported either course of action. In proceeding as it did, the district court properly exercised its discretion.

Unlike *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 108 S.Ct. 2268 (1988), this case raises no issue as to the district court's underlying subject matter jurisdiction. Nor in light of Judge Sand's extraordinary restraint can any petitioner seriously urge that the district court acted spasmodically or radically. Indeed, the district court clearly sought to preserve the sanctity of the rule of law against the politically motivated and racist excesses of a mob, typified by the four petitioners.

The doctrine of legislative immunity does not establish a bar to the reasoned exercise of the district court's equitable authority. Other courts have ordered state and local legislative bodies to take steps necessary to vindicate constitutional rights. Here, there is no quarrel but that the long term housing legislation served that same purpose. Thus, even absent the Consent Decree, the district court would have been justified in finding legislators in contempt for failure to take actions necessary to vindicate constitutional rights.

But, unike some contexts where federal courts have ordered legislative action, here, the Yonkers City Council agreed to adopt the long term housing ordinance. The body refused to follow through only in capitulation to the same kind of public opposition which the courts below have found to be

racist in motivation and discriminatory in effect.

Recognizing the appropriateness of the district court's action does not compel rejection of the doctrine of legislative immunity for local legislators. But, conversely, recognizing the vitality of the latter doctrine does not compel reversal here. The policy considerations which inform that common law doctrine do not apply in this situation. Here, no legislator was sued in his individual capacity under 42 U.S.C. sec. 1983. None was forced to defend discretionary actions taken in the course of normal legislative action. No claim of violation of constitutional right was asserted in the liability phase of this case against individual council members. Instead, in remedying adjudicated constitutional violations, the district court entered orders which petitioner/legislators thwarted. Still, the district court held off action against the legislators.

In January 1988, the legislature entered into a Consent Decree which compelled the body to enact certain legislation necessary to cure constitutional violations. The district court entered this order on consent and its obligations became binding upon all parties, including each City Council member as all served as the City's officers and agents for its purposes. Even without such consent, the orders against the individual council members were necessary to vindicate constitutional rights protected by the Fourteenth Amendment.

The law recognizes no exception permitting City Council members to be excused from compliance with the terms of a Consent Decree or a court order. Permitting such an exception will render any agreement with a municipal body untenable. Any such defendant could simply escape from compliance by refusing to discharge its agreed-upon duty with absolutely no consequences for the members committed to comply. The court would then be left with the daunting task of taking over municipalities as the means of enforcing compliance.

Likewise, legislators' right to freedom of speech was not extinguished when the district court ordered council members to discharge the duties undertaken in the Consent Decree. Members were free to speak out, as they continued to do, in defiance of the district court and in objection to the liability findings and remedy order. What legislators could not do, however,

was to violate the terms of the Decree as they did when they refused to adopt *any* long term housing ordinance, as it required. No case cited by petitioner Chema holds or suggests that the First Amendment bars a federal court for entering orders required for the discharge of undertakings previously made by a legislative body or orders requiring legislative action itself if necessary to purge violations of constitutional law.

This is not an instance where a legislative body has sought to compel speech or a vote, for that matter. It is an instance where local legislators have sought to wriggle out of commitments made by their body to a federal court.

III. ARGUMENT

A. THE DISTRICT COURT HAD THE AUTHORITY TO ENFORCE ITS ORDERS, INCLUDING THE IMPOSITION OF CONTEMPT SANCTIONS AGAINST PETITIONERS

Article III courts have inherent authority to enforce their own orders. "An order issued by a court with jurisdiction over the subject matter and the person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United States Mine Workers,* 330 U.S. 258, 293 (1947).

Absent such authority, a district court becomes a mere advisory body and disrespect for the law is advanced. This is particularly true where public officials are involved, for their flagrant disrespect for the law is contagious and their conduct acts as a paradigm for ordinary citizens. *Butz v. Economou,* 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law . . ."); *United States v. Chicago Board of Education,* 567 F.Supp. 272, 284 (N.D.Ill. 1983).[21]

Upon entry, a Consent Decree becomes a binding court order. *Delaware Valley Citizens v. Commonwealth of Pa.,* 678

21. Contrary to Spallone's alarmist invocation of the image of a lower court "running roughshod over local legislators, (Brief at 13), this case presents the spectacle of local legislators acting above the law. Spallone has publicly compared a tempered federal judge to Stalin and Hitler; has pledged resistance to the law whatever the personal cost and has built a political career running against the civil rights of racial minorities.

F.2d 470 (3d Cir. 1982); *Thomas v. City of Evanston*, 636 F.Supp. 587 (N.D. Ill. 1986). Moreover, the officers and agents of a municipal entry, like any other party, are fully bound by the dictates of an order. *Delaware Valley*, at 476. They are not "strangers" to the Decree as petitioners submit, but rather the Council's approval of the Decree preceded and predicated its entry which bound all its members.[22]

F.R.Civ.P. 65(d) insures that a party cannot slither out of compliance with injunctions via the fancy footwork of those associated with it. Persons identified with a party; in privity with a party or acting for the party all are bound by injunctions.[23] A contrary rule would allow a defendant to nullify an injunction through the acs or omissions of its officers or agents. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

That a particular agent may not have consented to entry of an order has no relevance to Rule 65(d). This principle fully applies to municipalities which are under court order. A Consent Decree binds signatories and their agents and each City Council member falls within that category regardless of whether he individually approved the Decree. Nor does the absence of individual legal representation at the time of the Decree's entry modify the legislators' obligation to comply with entered

22. This well-settled doctrine stands squarely against petitioner Spallone and Chema's suggestion that because they failed to vote for the Consent Decree, the consequent court order does not bind them. The Yonkers City Council acts upon majority vote and the majority binds all members and city officials. In any event, the Consent Decree, once entered, does not selectively apply to council members who favored it, the rather absurd position advanced by Spallone and Chema, any more than would a court order, entered independent of a Consent Decree, apply only to defendants who expressly agreed with it.

23. Of course, where a third party does not have any such relationship with the parties to a Consent Decree, *their* consent cannot bind it. *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063, 3079-3080 (1986). Petitioners' citation to this case are inapposite as their relationship to the City of Yonkers is, of course, juridically distinguishable from that the union in *Local Number 93* held to either party.

orders. *Delaware Valley Citizens Council v. Com. of Pennsylvania*, 678 F.2d 470, 474 (3d Cir. 1978) (finding that state legislators' interests represented by counsel for Commonwealth).

In the instant setting, the district court entered a Consent Decree by which the City of Yonkers had bound itself, through the January 27, 1988 vote of its City Council, to enact legislation necessary to vindicate constitutional rights. The relevant municipal officers then repeatedly and wilfully failed to discharge their obligations.

In such a circumstance, the district court had clear authority to enforce its orders, both the underlying Housing Remedy Order; the referenced Consent Decree and the Order of July 26, 1988, through use of traditional sanctions, including a holding of civil contempt and the imposition of jail time, if necessary to compel compliance. *Mine Workers, supra.*, at 332 ("There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."); *Hutto v. Finney*, 437 U.S. 678, 690-91 (1978). *Local 93, International Association of Firefighters, AFL-CIO v. Cleveland*, 106 S.Ct. 3063, 3076 (1986) [24]; *United States v. City of Miami*, 664 F.2d 435, 440, n.8 (5th Cir. 1982); *Gates v. Collier*, 616 F.2d 1268, 1271 (5th Cir. 1980); *reh'g granted*, 636 F.2d 942 (1981) ("where a state expresses its unwillingness to comply with a valid judgment of a federal district court, the court may use any of the weapons generally at its disposal to ensure compliance. Federal courts are not reduced to issuing [judgments] against state officer and hoping for compliance. citations omitted.").

In reviewing a holding of contempt and the imposition of sanctions, this Court has adopted an abuse of discretion test. *Hutto, supra.*, at 690; *Delaware Valley Citizens Council, supra.*, at 478. When, for instance, civil contempt sanctions are

---

24. Unlike the situation in *Local Number 93, supra*, at 3075-76, here the Consent Decree alone was not "the source of the court's authority to enter into any judgment at all." Instead, the Consent Decree implemented the prior HRO, itself predicated upon the scope of defendant City's violations of constitutional law and statute.

not intended to coerce a required action, but are rather punitive, they may represent an abuse of discretion. Where the contemnor does not hold the keys to the prison cell and cannot purge his own contempt status, such sanctions are likewise inappropriate. But, here, no such contention is advanced. Each contemnor could have quite simply cured his contempt by voting as required by the Consent Decree.

This, indeed, represented a garden-variety contempt citation, if noteworthy for the degree of bitterness and disputation aroused. *Shillitani v. United States*, 384 U.S. 364 (1966). The contemnors clearly could have discharged the requirements of the Decree at any time and thereby terminated the civil contempt finding and the attendant sanctions. In this setting, the course chosen by the district court was not an abuse of discretion. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146 (9th Cir. 1983) ("A court has the power to adjudge in civil contempt *any person* who willfully disobeys a specific and definite order requiring him to do or refrain from doing an act.").

B. THE DISTRICT COURT HAD NO LESS INTRUSIVE ALTERNATIVE

Petitioners make much of the NAACP's support for the entry of an order creating the Yonkers Affordable Housing Commission and suggest that the district court abused its discretion by failing to adopt a course less intrusive upon legislative perogatives. Respondent NAACP supported this option not because it was any less intrusive. To the contrary, the NAACP contended that the City's inaction, between 1986-1988, justified the divesting of City officials, including the legislature, of all authority relating to implementation of the HRO.

This proposal represented a more radical and deeper intrusion into local autonomy than the course chosen by the district court. As the district court recognized in commenting upon the suggestion that it take over the City, "this court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or power, but rather a concept of what the proper role of a federal court is in circumstances like this one." (A-357).

Instead, after broaching other alternatives, the district court sought to hold the City to the course of conduct *it* had

agreed to perform. Rather than impose what the NAACP viewed as the necessary divesting of power from recalcitrant and obstructive local officials, the district court merely required them to discharge assumed obligations. No case cited by petitioners suggests that the district court's course was *more* intrusive than that supported by the NAACP.[25]

Moreover, contrary to their disingenuous position before this Court, in the district court, no petitioner supported the appointment of a commission or a master to assume control over Yonkers' municipal affairs as a less drastic alternative than the course reflected in the July 26, 1988 Order. Indeed, the City expressly questioned the district court's authority to so proceed (A-377-379).[26]

In this light, the district court chose the least intrusive course of action and this should be sustained.

---

25. The cases petitioners cite do not show that the district court had a less intrusive alternative. In *Spain v. Mountanos*, 690 F.2d 742 (9th Cir. 1982), a state comptroller appealed from an order requiring him to pay state funds for plaintiff's attorney fees despite refusal by the state legislature to authorize such payment. The Ninth Circuit upheld the order noting that a state cannot frustrate such an award "by setting up state law barriers to block enforcement." (at 745). Likewise, in *Gary W. v. State of Louisiana*, 622 F.2d 804, 622 F.2d 804 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981), despite similar legislative disapproval, the district court required state officials to pay attorneys fees. *Also see, Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *rehg. granted*, 636 F.2d 942 (1981). In these cases, the district courts directed the official authorized by state law to make disbursements required by federal law. In Yonkers, the local entity required to pass legislation, the City Council, was directed to perform that role, as it had agreed to do. Thus, these precedents suggest that there was no less intrusive course available to the district court to gain compliance with the commitment Yonkers had undertaken.

26. Repeatedly, the City Council refused to concede that the district court had the authority to appoint a commission to discharge its obligations under the long term plan. Now, the petitioners, having opposed this course below, strenuously submit that the district court abused its discretion by not proceeding in that, assertedly less intrusive, manner.

C. THE DOCTRINE OF LEGISLATIVE IMMUNITY DOES NOT CONTROL THIS CASE

Petitioners each suggest that the doctrine of legislative immunity controls this case. We strongly disagree. Assuming *arguendo* that this Court extends the doctrine of legislative immunity to local legislators, the question is whether that would or should affect the outcome in this case.

At the threshhold, the action required here was *not* legislative and thus petitioners should gain no protection from the doctrine of legislative immunity. As its express terms were established by court order, the instant legislation did not allow petitioners to exercise legislative judgment or balance their social concerns against plaintiffs' constitutional rights. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (privilege applies only to actions taken within legislative sphere).[27]

Nor did the required act implicate any other traditional function of the legislative body. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1962) (recognizing legislative immunity "in the sphere of legitimate legislative activity" including investigative functions); *Oates v. Marino*, 106 A.D.2d 289 (2d Dep't 1984) (statements made by legislative aide do not make out claim of defamation as legislative immunity applies to comments which arose out of acts taken in legislative sphere).

Finally, the required vote was not a self-initiated act common to legislative bodies and required for their appropriate discharge of duty. *Cf. Eastland v. United States Servicemen's Fund*, 423 U.S. 491, 502 (1971) ("The purpose of the [speech or debate] Clause is to insure that the legislative functions the Constitution allocates to Congress may be performed *independently.*") (emphasis supplied); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980) ("The purpose of [the]

---

27. Of course, we are *not* suggesting that the clearly "unworthy purpose" of the majority of the Yonkers' City Council, *Tenney, supra.*, at 377, represented fully by these petitioners, defeats their claim. Rather, the context in which they acted, as we demonstrate, was simply not legislative as understood by this Court's prior cases.

immunity is to insure that the legislative function may be performed independently without fear of outside interference.")[28]

To the contrary, both the requirement that the Council enact the long term housing ordinance and the provisions of that ordinance had been settled before the Council vote. This remedial imperative and its source deprived the City Council of "independence" of action. Indeed, our context differs markedly from any of those in which courts have upheld extension of the doctrine of legislative immunity to local legislators. *Star Distributors Ltd. v. Marino*, 613 F.2d 4, 10 (2d Cir. 1980) (noting the inapplicability of immunity doctrine to enforcement setting as in *Bush v. Orleans Parish School Board*, 191 F.Supp. 871 (E.D.La.) (3-judge court), *aff'd sub. nom. Denny v. Bush*, 367 U.S. 908 (1961); *Cf. Lake County Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (suit challenging land use regulation which assertedly took petitioner's property without due process); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980) (diminution of plaintiff's property value from rezoning claimed to violate takings clause).[29]

During the months following entry of the January 1988 Consent Decree, the City Council voluntarily abdicated its role in determining the specifics of the legislation. For that, fault lies with the council members themselves. In light of their default, plaintiffs proposed that the court require the City's experts to draft an appropriate long term Housing Plan. This was done, commented upon by *all* parties and approved by the court in late June 1988. The "legislation," derives directly from the Plan

---

28. We note that Spallone addresses the actual context of the July 26, 1988 order in footnote 46, weakly stating, without any argumentation, that even under the circumstances, absolute legislative immunity must apply (Brief at 26).

29. Chema insists that what is at stake here is the "independent performance of the legislative function." *See*, Reply Brief, February 23, 1989, at 8, but this is simply not based upon an accurate representation of the context out of which this case arises.

and placed before the Council on July 26, 1988, was not subject, then, to legislative debate and amendment. Instead, the district court required its enactment to remedy underlying constitutional violations. That the district court might have allowed constructive and reasonable amendments to the ordinance does not alter the fact that passage of the ordinance was a ministerial, not a legislative act, and bore no indicia of legislation as that process is conceived of for purposes of the Speech or Debate clause or the comparable common law privilege."[30] *Lake County Estates Inc., supra,* at 404-405.

Moreover, the rationale for the common law doctrine of legislative immunity is straightforward and without application here: our system of checks and balances places beyond sanction the legislative acts of individual legislators. This protects legislators from the distractions and expense of litigation. It allows them to cast legislative votes in a manner calculated to represent their constituents. Allowing suit against individual legislators would inhibit legislative functioning and establish a serious disincentive to service. This would in turn stifle public service and counter "the public good." *Tenney, supra.,* at 377.

Where contempt sanctions against local legislators arise from their own violation of settled court orders, this logic simply has no bearing. Here, there was no need or occasion for Yonkers' legislators to balance social needs against constitutional rights. That process had already occurred. Indeed, unlike a suit against local legislators for their self-initiated actions,

---

30. This, too, separates the concerns raised here from those cited by Chema in suggesting that he was being forced to engage in compelled speech and to mis-represent his constituents. Chema was under a court order to vote for the ordinance. No one pretends that, by casting a vote in favor of the ordinance, Chema was expressing his *personal* support for that ordinance. Indeed, he was free to and did repeatedly clarify his opposition. However, the proper means of amending extant municipal zoning ordinances is through legislation and thus the Consent Decree contemplated such action. Chema had no right as an elected official to violate the Decree on the basis of his personal views; he had every right to express his reservations while complying with the court order.

here, the vote in question followed court order and no citizen could sue the council members for their required vote.[31] *Owens v. City of Independence*, 455 U.S. 622, 658 (1980) (recognizing that whether immunity extends to city officials under 42 U.S.C. sec. 1983 depends on functional analysis and the interests at stake).

In the instant case, a federal court found serious and gross violations of constitutional rights in litigation directed at municipal entities, not individual legislators. No argument can be made that the initial suit implicated the doctrine of legislative immunity as none of the legislators were sued in their official or individual capacities.

In remedying the serious adjudicated violations, the parties ultimately determined that certain legislative acts would be required. The City Council itself agreed. The district court found the parties' agreement satisfactory and entered its order. The necessary legislation, the City Council balked. This left the district court and the plaintiffs without implementation of the required and necessary remedial actions and the city in contempt.

Here, then, the policy considerations underlying the doctrine of legislative immunity are absent and another set of policy concerns instead dominate. Can legislators thwart with impunity the obligations they have voluntarily undertaken and escape without sanction? If so, for what reason? We submit that recognizing the doctrine of legislative immunity does not compel reversal of the decisions below.

In short, where a municipality has been found to have violated the Fourteenth Amendment, its agents and officers are

---

31. Yonkers has never appealed from the court orders requiring it to enact the long term housing legislation or from any aspect of that required legislation. Had the City Council, which dictates the City's legal positions in this suit, any legitimate objection to the provisions of the long term ordinance, it properly should have authorized an appeal of those provisions it felt exceeded appropriate equitable authority or were otherwise impermissible. In so proceeding, Yonkers could have sought entry of a stay to prevent any irreparable harm claimed from such provisions.

responsible for complying with the injunctive relief required to remedy the condition. If, as here, the local officials abdicate responsibility for devising an appropriate remedy, that responsibility falls to the district court. Where the legislative body agrees on a course of conduct requiring the passage of legislation to cure the constitutional violation, members may be held personally responsible should they abnegate their duties and fail to comply.[32]

We submit that such a legal doctrine recognizes two sets of principles: in the normal discharge of their legislative duties, local legislators have immunity against prosecution and sanction. However, where their action is required to cure constitutional violations, local legislators may be compelled to participate in the remedial process. *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233 (1964). ("...the district court may if necessary to prevent further discrimination require the Supervisiors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination its public schools system in Prince Edwards County.").

Failure to comply would subject legislators to the typical range of sanctions available against contumacious defendants.[33]

Nor did the finding of civil contempt or imposition of sanctions entail prohibited inquiry into legislative motives. While the doctrine of legislative immunity protects members *regardless* of the validity of their legislative actions and shields members from questioning concerning their motives, *Brewster, supra.,* at 508, this issue has no currency here. Petitioners were not held in contempt or sanctioned because of their motives or beliefs, but,

---

32. Chema submits that even in such a setting, he must have the latitude to vote "No," and, implicitly, to perpetuate the unconstitutional conditions the underlying order seeks to remedy. He provides no basis for this license. Nor does invocation of the responsibility of the legislator to his constituents support Chema's position. Constituents have no right to expect their representatives to perpetuate unconstitutional conditions. *Cf.* Chema's Reply Brief, February 23, 1989 at 5.

33. Spallone addresses this argument in footnote 46, p. 26 but provides no basic argument against its tenability.

rather because they failed to comply with an extant and valid court order.

As Petitioner Spallone concedes, this outcome is consistent with that contemplated in *Griffin, supra.* at 233 where this Court expressly approved the district court's authority to require local legislators to take those actions necessary and sufficient to reopen and operate non-discriminatorily that County's school system. Unless one reads that requirement as purely advisory and unsupported by resort, if necessary, to the court's arsenal of enforcement authority, including contempt, then it follows that, in certain remedial contexts, the common law doctrine of legislative immunity meets its limit. *Hutto v. Finney,* 437 U.S. 678 (1978) ("a federal court's interest in orderly, expeditious proceedings justified any reasonable action taken by the court to secure compliance with its orders.")

Nor is such a recognition of limits unique or anomalous. Even our most cherished First Amendment rights are not absolute. *Nebraska Press Association v. Stuart,* 423 U.S. 1319 (1975). The doctrine of executive privilege is limited by the imperatives of our criminal justice system. *United States v. Nixon,* 418 U.S. 683, 719-713 (1974). Even the Speech or Debate Clause itself does not protect a member from criminal liability for acts arguably within his legislative functions. *Gravel v. United States,* 408 U.S. 606, 627 (1972).

While the precise question presented here—whether a federal common law speech or debate privilege insulates local legislators from a finding of contempt and contempt sanctions when they violate clear orders arising from the need to vindicate constitutional rights—has not been settled, prior cases uphold the reach of federal authority to remedy violations of fundamental rights.

In *Milliken v. Bradley,* 433 U.S. 267 (1977), this Court affirmed an order requiring the State of Michigan to pay the costs of programs required to cure unconstitutional conditions stemming from discrimination and segregation in Detroit's public schools. Had Michigan failed to appropriate such funds, contempt sanctions would have been fully appropriate as a means of insuring compliance.

Petitioner Spallone blithely submits that recognition of the

doctrine of legislative immunity "will not deprive plaintiffs in this action of enforcement". This analysis is shallow: plaintiffs have contended and the lower courts found that the discriminatory actions of the Yonkers City Council have blocked minority mobility and signalled hostility toward racial minorities. The council's continued contumacious conduct has the intended effect of continuing this deprivation of minority rights.[34]

Moreover, any argument which rests on giving voice to the electorate in a situation like this is, at best, ironic. The lower courts have held that the Yonkers City Council translated discriminatory private sentiments into public policy and thereby resisted minority mobility in the City. The same sentiment overwhelmed the political process after entry of the Consent Decree in January 1988. Now, Spallone and other petitioners defend the doctrine of legislative immunity as necessary to vindicate the will of the majority. Again, the rights of racial minorities, so callously violated for generations, are subjugated.

This issue is not, as Spallone casts it (Brief t 30-31), to protect the council members who would continue to resist constitutional dictates, but the right to redress of racial minorities who are the victims of racial discrimination.

D. PETITIONERS HAVE NO INDEPENDENT FIRST AMENDMENT RIGHT WHICH PERMITS THEM TO VIOLTE THIS COURT ORDER

One petitioner, Chema, asserts that by directing him how to vote, the district court invaded his First Amendment right to freedom of speech. It is undeniable that no court has sought to

---

34. Spallone also suggests (Brief at 30) that upholding the Court of Appeals for the Second Circuit's decision will diminish the "willingness of legislators to approve consent decrees." To the contrary, reversal of the Second Circuit's opinion will make the obligations undertaken by municipalities in Consent Decrees unenforceable as against those who specifically approved them, the local legislators, and increase the incentive for individual legislators to change their votes should popular opposition surface to the obligations undertaken.

limit any utterance of Chema's. Nor can Chema deny that he has taken full advantage of the protections of the First Amendment, engaging in continual attacks on the district court and the propriety of the Consent Decree.

Chema cites no case which recognizes the "right" of a legislator to violate court orders claiming that they impinge on his First Amendment right. This case does not resemble those in which legislatures sought to compel private citizens to engage in acts violative of his/her religious or political philosophy. Nor is the Court being asked to review an enactment which arguably chilis legitimate political activism. *Cf., Meyer v. Grant,__U.S.__, 108 S.Ct. 1886; 100 L.Ed. 425 (1988),* or dissent in an overbroad manner. Finally, unlike *Wzeski v. City of Madison,* 558 F.Supp. 664 (W.D.Wis. 1983), the Court is not now asked to review a legislative enactment requiring, with no compelling basis, a legislator to vote on each occasion a resolution is introduced before the body on which (s)he serves. That case involved no compulsion dictated by the compelling ground of vindicating adjudicated constitutional rights as manifest in the orders derived from the January 1988 Consent Decree.

Instead, in his official capacity, as a City council member, Chema bears responsibility for helping to cure unconstitutional conditions. He cannot wriggle loose from this obligation by claim that a right *personal* to him would be violated should *he be forced to use his legislative* powers in conformance with the constitution and settled orders. As a person, he is being forced to make no compelled speech. As a legislator, he is being required to take acts made necessary by the adjudication of unconstitutional conduct.

As the Second Circuit correctly held, should the performance of such duties be anethema to Chema, he may hand the authority of governance to a person fully prepared to discharge his/her office in furtherance of the Constitution of the United States. If he retains his office, he must be held responsible for his obstruction of the remedial process lest the constitutional guarantees enjoyed by other citizens he cheapened and he be permitted to act above the law.

Petitioner cites to First Amendment cases without application here. In *Boos v. Barry,* 99 L.Ed. 2d 333 (1988), reiterating

that the First Amendment reflects "a profound national commitment" to the principle that "debate on public issues should be uninhibited, robust and wide open," *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Court invalidated a District of Columbia law restricting the display of "critical" signs within five hundred feet of foreign embassies. Such a content-based ban on speech clearly infringed upon the free-flow of ideas and represented a form of censorship.

Here, Chema was permitted to engage in as free a flow of ideas as he pleased. Indeed, City Council meetings became spectacles at which opponents of the Consent Decree never-endingly vented their hostility at the court; the OHA and the plaintiffs. The district court never considered, let alone entered, any order directed at this speech.

On the other hand, permitting such a free exchange of ideas, whatever their content, differs from allowing those with political authority to flout their constitutional function and ignore or exacerbate the adjudicated violation. ". . . .[I]t is the reason alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government." Hamilton, *Madison & Jay* "The Federalist Papers," No. 50, Mentor Books, 1961.

Chema points to no case in which a legislator, desirous of avoiding *that* responsibility, successfully invoked the First Amendment as a shield. As in *Bond v. Floyd,* 385 U.S. 16 (1966), where the Georgia State Assembly had "no interest in limiting. . . .legislators' capacity to discuss their views of local or national policy," the district court entered no injunction prohibiting speech. It did, however, seek to hold members of the legislative body to their obligation. Nor in general does a "freedom of speech" defense absolve a person who commits contempt in the presence of a court. *Taylor v. Hayes,* 418 U.S. 488 (1974). This should not be the first such occasion for recognition of either doctrine."

35. Chema's First Amendment argument falls for precisely the same reason his legislative immunity argument does: both are expressly predicated on the notion that Chema retained "independence" to engage in legislative acts. P ıt this is simply a fiction in this context. Chema's vote was compelled in furtherance of a remedy of constitutional violations. Nothing in either decision below purports to limit a legislator's discharge of his obligations, and the attendant freedoms of speech and vote, in the normal legislative setting.

E. THE LONG TERM ORDINANCE WAS FULLY CONSISTENT WITH THE CONSENT DECREE

Chema submits that because the long term ordinance contemplates a role for the Office of Implementation and the Planning Board, it divested the City Council of powers it had reserved in the January Consent Decree. This is fatuous. The powers provided the former two bodies are purely advisory and the long term ordinance maintained the City Council's ultimate role in approving any mix of municipal incentives provided to developers. (A-310, Section B).

Contrary to Chema's misinformed Brief (at 47), the long term plan ordinance did *not* remove "all discretion" from the Council; rather, the Council retained discretion to alter zoning to accommodate the needs of a given developer and to determine the appropriate mix of incentives required to stimulate any given project.

F. THE CONSENT DECREE WAS FULLY CONSENSUAL

After entering into the Consent Decree, council members faced substantial political pressures. This caused Longo and Fagen, who had voted for the January 27, 1988 resolution approving the Decree, to align with Chema and Spallone, who had not. This coalition began asserting, as it now does before this Court, that the Decree itself was non-consensual and coerced.

The district court clearly and justifiably threatened the City with contempt on several occasions before the City Council voted to adopt the Consent Decree. Hoever, the district court had cause and basis for these threats and to the extent they finally prompted the council to agree to sites for the 200 units of public housing, the threats were useful and achieved their objective. In railing against these threats, petitioners conveniently ignore that *their inaction and obstructiveness* created the crisis situation Yonkers faced. They failed to submit sites for the 200 units of public housing (by September 1986, as required). They failed to devise any form of long term housing plan (by November 1986, as required). They acted as if the district

court's authority was a nullity, of no moment to themselves. They rallied public antipathy against the federal court in a display of dastardly cowardice.

As futile as is his argument that he was finally coerced into following the constitution, Chema's suggestion that a succeeding legislative body can undo the acts of a first is ill-taken. Here, the legislative act-approval of a Consent Decree-ripened into a binding court order. Is Chema suggesting that the legislature retains, as against a federal district court, the authority to disengage from settled obligations when it is so motivated? *Cf.* Brief at 43. Again, the fundamental misconception of petitioners' argument surfaces; they do not have "unfettered" authority to violate court orders, so long as they do so through votes.

CONCLUSION

This case raises questions of great moment for our constitutional system. But, the crucial issues are *not* those petitioners bring before this Court. Instead, the singular issue to be addressed is whether the rule of law applies to individual legislators who flout court orders. Here, each of these petitioners had appropriate notice of the relevant order, and an opportunity to justify his failure to abide. Each provided no basis for his action. Instead, capitulating to rampant majoritarianism, these petitioners seek support for their recalcitrance from this court. Improperly analogizing themselves to local legislators who have *not* violated extant court orders, petitioners seek to have this Court extend legislative immunity in a matter calculated to diminish the authority of federal courts and to strip the arsenal of responses necessary where such contemptuous conduct occurs.

In our judgment, the public good will be much better served by affirmance of the decisions below as they sensitively treat the particular context, doing no violence whatsoever to the general principles of legislative immunity and freedom of speech.

Respectfully submitted,

GROVER G. HANKINS
NAACP Special Contribution Fund
4805 Mt. Hope Dr.
Baltimore, MD 21215
(301) 358-8900
Attorney for Petitioner

On the Brief:
MICHAEL H. SUSSMAN
SUSSMAN & SUSSMAN
30 South Broadway #418
Yonkers, NY 10701
(914) 968-4558

MAY 30, 1989

(8) (11) (8)

Nos. 88-854, 88-856, and 88-870

Supreme Court, U.S.
FILED
JUN 13 1989
SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

56pp

QUESTION PRESENTED

Whether the district court properly imposed civil contempt sanctions against individual members of the Yonkers City Council, when those Council members were obstructing the City of Yonkers' compliance with that courts' valid orders to remedy illegal racial segregation of the City's public and subsidized housing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Summary of argument	18
Argument:	
The district court properly imposed civil contempt sanctions against individual members of the Yonkers City Council for obstructing the City of Yonkers' compliance with valid court orders	22
A. The district court has authority to impose civil contempt sanctions against individual members of the Yonkers City Council for obstructing the City of Yonkers' compliance with valid court orders	22
B. The doctrine of legislative immunity does not shield individual members of the Yonkers City Council from sanctions for obstructing the City of Yonkers' compliance with valid court orders	27
C. The First Amendment does not shield individual members of the Yonkers City Council from sanctions for obstructing the City of Yonkers' compliance with valid court orders	39
D. The district court properly exercised its discretion to bring about compliance with its orders by holding individual members of the Yonkers City Council in contempt rather than by ordering legislation into effect itself or by appointing a commission to do so	42
Conclusion	48

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	25, 37
Aitchison v. *Raffiani*, 708 F.2d 96 (3d Cir. 1983)	29
Alemite Mfg. Corp. v. *Staff*, 42 F.2d 832 (2d Cir. 1930)	23
Alexander v. *Holmes County*, 396 U.S. 19 (1969)	36
Amy v. *The Supervisors*, 78 U.S. (11 Wall.) 136 (1870)	30
Anderson v. *Dunn*, 19 U.S. (6 Wheat.) 204 (1821)	42, 43

Cases – Continued: Page

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 35
Bessette v. *W.B. Conkey Co.*, 194 U.S. 324 (1904) 23
Board of Commissioners v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860) 31, 35
Bond v. *Floyd*, 385 U.S. 116 (1966) 37
Brown v. *Board of Educ.*, 349 U.S. 294 (1955) 33, 36
Bruce v. *Riddle*, 631 F.2d 272 (4th Cir. 1980) 29
Bush v. *Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960) 33
Bush v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), aff'd *sub nom. Denny* v. *Bush*, 367 U.S. 980 (1961) 33
Butz v. *Economou*, 438 U.S. 478 (1978) 19, 27, 32
City of Galena v. *Amy*, 72 U.S. (5 Wall.) 705 (1866) 31
Clark v. *Marengo County*, 623 F. Supp. 33 (S.D. Ala. 1985), aff'd, 811 F.2d 609 (11th Cir. 1987) 37
Clarke v. *United States*, 705 F. Supp. 605 (D.D.C. 1988', appeal pending, No. 88-5439 (D.C. Cir.) 40, 41
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979) ... 20, 36
Commissioners v. *Sellew*, 99 U.S. 624 (1878) 31, 32, 33
Connett v. *City of Jerseyville*, 125 F.2d 121 (7th Cir. 1942) 31
Connick v. *Myers*, 461 U.S. 138 (1983) 41
Cooper v. *Aaron*, 358 U.S. 1 (1958) 19, 27
Copenhaver, In re, 54 F. 660 (C.C.W.D. Mo. 1893) 31
County Commissioners v. *Wilson*, 109 U.S. 621 (1883) ... 31
East St. Louis v. *Amy*, 120 U.S. 600 (1887) 30
Espanola Way Corp. v. *Meyerson*, 690 F.2d 827 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983) 29
Forrester v. *White*, 108 S. Ct. 538 (1988) 19, 20, 27, 28, 32
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911) 22, 23
Gorman Towers v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) 29
Gravel v. *United States*, 408 U.S. 606 (1972) 29, 39
Green v. *County School Bd.*, 391 U.S. 430 (1968) 36, 44
Griffin v. *County School Bd.*:
377 U.S. 218 (1964) 34, 36
363 F.2d 206 (4th Cir. 1966) 25
Gunn v. *University Committee*, 399 U.S. 383 (1970) 23

Cases—Continued: Page

Hernandez v. *City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982) 29
Jordan v. *City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984) 37
Kendall v. *Stokes*, 44 U.S. (3 How.) 86 (1845) 35
Kilbourn v. *Thompson*, 103 U.S. 168 (1880) 39
Kuzinich v. *County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982) 29
Labette County Commissioners v. *Moulton*, 112 U.S. 217 (1884) 31
Lac Vieux Desert Band of Lake Superior Indians v. *Waterssmeet Township*, No. M82-161 CA (W.D. Mich. Sept. 2, 1987) 36
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 28, 29, 39, 40
Lennon, In re, 166 U.S. 548 (1897) 23, 25, 26
Local 28, Sheet Metal Workers v. *EEOC*, 478 U.S. 421 (1986) 44
Louisiana v. *United States*, 380 U.S. 145 (1965) 33
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 33
Mobile v. *Watson*, 116 U.S. 289 (1886) 30-31
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 29, 36
People ex rel. Pierce v. *Guggenheimer*, 44 App. Div. 399, 60 N.Y.S. 703 (1899) 31
Powell v. *McCormack*, 395 U.S. 486 (1969) 36, 37
Reed v. *Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) 29
Rees v. *City of Watertown*, 86 U.S. (19 Wall.) 107 (1873) 31
Regal Knitwear Co. v. *NLRB*, 324 U.S. 9 (1945) .. 18, 23, 26, 33
Reynolds v. *Sims*, 377 U.S. 533 (1964) 43-44
Riggs v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867) ... 31
Shillitani v. *United States*, 384 U.S. 364 (1966) 18, 22, 42, 43
State ex rel. Baumann v. *Judge*, 38 La. Ann. 43 (1886) ... 31
State ex rel. Edwards v. *District Court*, 41 Mont. 369, 109 P. 434 (1910) 31
Supervisors v. *Rogers*, 74 U.S. (7 Wall.) 175 (1869) 43

Cases—Continued: Page

Supervisors v. *United States*, 71 U.S. (4 Wall.) 435 (1866) 31
Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719 (1980) 20, 28, 35, 36, 39
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 33, 44
Tenney v. *Brandhove*, 341 U.S. 367 (1951) 28, 32, 39, 40
The President ex rel. Moran v. *Mayor*, 40 F. 799 (C.C.D.N.J. 1889) 31
United States v. *Ballin*, 144 U.S. 1 (1892) 26
United States v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982) 36
United States v. *Fleischman*, 339 U.S. 349 (1950) 26, 33
United States v. *Gillock*, 445 U.S. 360 (1980) 20, 28-29, 34, 36, 37
United States v. *Green*, 53 F. 769 (C.C.W.D. Mo. 1892) .. 31
United States v. *Hall*, 472 F.2d 261 (5th Cir. 1972) 25
United States v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) 22
United States v. *Lovasco*, 431 U.S. 783 (1977) 24-25, 37
United States v. *Nixon*, 418 U.S. 683 (1974) 20, 34
United States v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) 37
United States v. *Paradise*, 480 U.S. 149 (1987) 43
United States v. *Town of Cicero, Illinois*, No. 83 C 413 (N.D. Ill. May 15, 1986) 36
United States v. *United Mine Workers*, 330 U.S. 258 (1947) 22, 33, 44
United States v. *Yonkers Bd. of Educ.*:
624 F. Supp. 1276 (S.D.N.Y. 1985) 2, 3
635 F. Supp. 1577 (S.D.N.Y. 1986) 3, 4, 5
No. 80 CIV 6761 (S.D.N.Y. May 28, 1986) 3
675 F. Supp. 1407 (S.D.N.Y. 1987) 8
675 F. Supp. 1413 (S.D.N.Y. 1987) 9
837 F.2d 1181 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988) 9, 13, 23
No. 89-6050 (2d Cir. Apr. 17, 1989) 38
United States ex rel. Huidekoper v. *Buchanan County*, 24 F. Cas. 1288 (C.C.W.D. Mo. 1878) (No. 14,679) ... 31
United States ex rel. Jones v. *City of West Palm Beach*, 94 F.2d 320 (5th Cir. 1938) 31

Cases – Continued: Page

United States ex rel. Thompson v. *Lee County*, 26 F. Cas. 911 (C.C.N.D. Ill. 1869) (No. 15,589) 31
United States ex rel. Watts v. *Justices of Lauderdale County*, 10 F. 460 (C.C.W.D. Tenn. 1882) 31
Von Hoffman v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1866) 31
Westfall v. *Erwin*, 108 S. Ct. 580 (1988) 30, 32
Wise v. *Lipscomb*, 437 U.S. 535 (1978) 43
Wrzeski v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983) 40
Yonkers Racing Corp. v. *City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989) .. 12, 18, 38
Yost v. *Dallas County*, 236 U.S. 50 (1915) 30, 43
Young v. *United States ex rel. Vuitton*, 481 U.S. 787 (1987) 22

Constitution, statutes, regulations, and rules:

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) .. 19, 28, 37, 39
Art. III 33, 47
Amend. I 21, 39, 40, 41, 42
Amend. XIV (Equal Protection Clause) 3
Civil Rights Act of 1871, 42 U.S.C. 1983 ..... 28, 29, 30, 35
Civil Rights Act of 1968, Tit. VIII (Fair Housing Act), 42 U.S.C. 3601 *et seq.* 3, 29, 36
District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, Tit. I, § 145, 102 Stat. 2269 40
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* 36
18 U.S.C. 401 22
N.Y. Pub. Off. Law § 2 (McKinney 1952) 26
City of Yonkers Charter (1966):
Art. II, § C2-5 10
Art. III, § C3-1.A 34
Art. IV:
§ C4-1 34
§ C4-2 34

Regulations and rules – Continued: Page

24 C.F.R.:
Section 570.301(a)(4) 4
Section 570.304(b) 4
Section 570.306 4
Fed. R. Civ. P.:
Rule 65(d) 18, 23, 25, 26, 33
Rule 70 ..... 18, 23, 43
Rule 71 ..... 18, 23, 26

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-854

HENRY G. SPALLONE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-856

PETER CHEMA, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 88-870

NICHOLAS LONGO AND EDWARD FAGAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 856 F.2d 444.[1] The pertinent orders and opinions of the district court contained in the joint appendix are unreported: order requiring compliance with consent decree, July

---

[1] "Pet. App." refers to the appendix to the petition in No. 88-854.

26, 1988 (J.A. 397-400); modification letter, July 28, 1988 (J.A. 401); oral opinions finding petitioners in civil contempt, August 2 and 4, 1988 (J.A. 429-431, 443, 475-476); order adjudicating petitioners in civil contempt, August 2, 1988 (J.A. 445-447).

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1988. The petitions for a writ of certiorari were each filed on November 23, 1988, and were granted on March 6, 1989.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT[3]

1. After more than 90 days of trial, the district court issued a decision on November 20, 1985, holding the City of Yonkers liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing. *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985).[4] The district court held that the

---

[2] The Court limited its grant of certiorari in No. 88-856 to the first five questions presented in the petition. J.A. 624.

[3] The contempt adjudications at issue arose during the remedial phase of the civil rights action initiated in 1980 by the United States against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. Because the orders before this Court must be reviewed within the context of the efforts by the City of Yonkers and the Yonkers City Council to block compliance with the district court's remedial orders, we set forth in some detail the procedural history of this case.

[4] The district court also held the City of Yonkers and the Yonkers Board of Education liable for systemwide racial segregation in the Yonkers public schools. *United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1376-1545 (S.D.N.Y. 1985).

The Yonkers Branch of the National Association for the Advancement of Colored People (NAACP) and an individual minority student, by her next friend, moved to intervene in the action as plaintiffs. In June 1981, the district court granted leave to intervene and later certified the action as a class action on behalf of all black residents of Yonkers who were residents of, or eligible to reside in, public or subsidized housing in Yonkers, or who were parents of students attending public school in Yonkers. See 624 F. Supp. at 1288 n.1.

City had violated the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, by deliberately concentrating virtually all of its public and subsidized housing in the southwest quadrant of Yonkers. The City's purpose, the court specifically found, was to maintain racial segregation. The court based its holding in large part upon the actions and inactions of the Yonkers City Council and individual Council members. See 624 F. Supp. at 1295-1328, 1342-1363, 1369-1372. In sum, the court found that "for more than thirty years, the site selection process for subsidized housing was dominated by the unwillingness of the City Council to approve or support a site in the face of community opposition," and that this unwillingness was motivated in significant part by "the desire to preserve existing patterns of segregation." *Id.* at 1371.[5]

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order," requiring the City to take a number of actions—including legislative action by the City Council—designed to facilitate the development of public and other subsidized housing outside Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). Part IV of the Housing Remedy Order required the City to designate sites for 200 units of public housing in East Yonkers, and to submit both an acceptable Housing Assistance Plan (HAP) and an executed grant agreement to HUD. The Order provided that if the City failed to comply with these requirements, the plaintiffs were to submit the HAP, the

---

[5] Evidence of segregative intent included City Council members' acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (624 F. Supp. at 1369-1372), the City Council's reluctance to seek federal Section 8 housing certificates, and, when the certificates were obtained, the confining of their use to minority families only in Southwest Yonkers (*id.* at 1342-1363).

The district court also issued supplemental findings of fact following the remedial hearings, concluding that the City had continued its pattern of discriminatory practices through the date of the Housing Remedy Order. *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y. May 28, 1986), slip op. 1-3.

grant agreement, and the proposed public housing sites to the court and, upon approval, the court would deem the submissions to have been made by the City. See *id.* at 1580-1581.[6]

Part VI of the Housing Remedy Order required the City to develop and implement a plan, known as the Long Term Plan, for the creation of assisted housing, other than public housing, outside Southwest Yonkers. See 635 F. Supp. at 1582. The district court declined to set a goal for the number of housing units to be developed under the Long Term Plan, to establish a timetable, or to prescribe how the housing should be provided. Instead, the court left to the City, and to the City Council, both the opportunity and the responsibility for proposing the substantive aspects of the Plan. The City was to submit a proposed Long Term Plan by November 1986. *Ibid.*

2. The City appealed the district court's orders. Although implementation of the Housing Remedy Order was not stayed (Pet. App. 6a), the City took "no significant action to comply with the 1986 Housing Remedy Order" during the year and a half that its appeal of the district court's orders was pending in the court of appeals (*id.* at 7a).

a. The City "totally defaulted" in its obligation to designate public housing sites under Part IV of the Housing Remedy Order (Pet. App. 6a). As a result, under the terms of the Order, the court deemed the City to have submitted three unused

---

[6] A grantee's submission of an acceptable HAP and execution of a grant agreement are prerequisites to the receipt of Community Development Block Grant (CDBG) funds. See 24 C.F.R. 570.301(a)(4), 570.304(b). The HAP, among other requirements, must set forth annual and three-year goals for the number, type, and general location of assisted housing units to be developed in the municipality, as well as the actions the grantee will take to achieve these goals. See 24 C.F.R. 570.306. The City had previously committed itself to provide sites for 200 units of assisted housing in East Yonkers as a condition to its receipt of CDBG funds, but had never honored that commitment. See 635 F. Supp. at 1580. The Housing Remedy Order's requirement that the City submit an HAP and execute a grant agreement thus required the City to reaffirm its commitment to the development of 200 units of public housing in East Yonkers. Submission of these documents was also needed to establish the Affordable Housing Trust Fund, which, with CDBG funds, will facilitate development of housing under the Long Term Plan. See *id.* at 1581-1582.

school sites to be used for 140 units of the housing. 635 F. Supp. 1580-1581.[7] In November 1986, the City also refused to submit a proposed Long Term Plan, as required by Part VI of the Order (Pet. App. 7a). In the following month, the United States moved to have the City held in contempt. Instead of imposing this sanction, however, the district court permitted the City to appoint an Outside Housing Advisor (Advisor) to assist it in carrying out the Housing Remedy Order (Pet. App. 7a; R. 233).

The Advisor reported to the court on his activities on April 9, 1987 (J.A. 35-46). In consultation with members of the City Council, Yonkers community groups, and local clergy, the Advisor was trying to identify additional public housing sites in order to reduce the number of units on two of the three already-designated sites, and to distribute the remaining units on sites scattered throughout East Yonkers (J.A. 36-38). At a hearing later that month, the Advisor identified eight such sites and explained how each could be made available for public housing. Among the sites were three unused parcels that Westchester County had given to the City for parkland (the County sites) (J.A. 57-59). Use of these sites for public housing required action by the County (J.A. 52).

b. On May 8, 1987, the City moved for an order modifying the Housing Remedy Order in accordance with a resolution passed by the City Council on April 15 (J.A. 69-78; see also J.A. 84-87). This resolution expressed the City Council's support for the Advisor's scattered site plan, but conditioned that support on a number of terms, including (1) a stay of all construction until the City had exhausted its appeals from the district court's orders; (2) limitations on the housing to be developed under the Long Term Plan; and (3) a requirement that committees of area residents screen all applicants for public housing (J.A. 65-68). Accordingly, the City's motion called for designation of scattered public housing sites by the Advisor in consultation with "site selection committees of local residents, community

[7] The City also refused to submit an HAP or to execute a grant agreement with HUD. Under the Housing Remedy Order, counsel for the United States prepared these documents, which the court deemed to have been submitted by the City.

leaders and elected officials from each affected ward of the City" (J.A. 71-72), and included conditions similar to those in the City Council's resolution (J.A. 73-74).

At a hearing on May 12, the district court offered to consider the City's motion and stated that it preferred a remedial plan that would "embody to the maximum possible extent consistent with the purposes of the housing remedy order the views of the community itself" (J.A. 87). The court asked the City to demonstrate that its motion was not merely a delaying tactic and suggested that it take the preliminary steps necessary to obtain control of the sites identified by the Advisor, namely, having the City Council pass a resolution requesting Westchester County to permit the City to use the County sites for housing (J.A. 87-91).

By June 23, 1987, the City Council had neither passed the suggested resolution nor taken any action to obtain the sites proposed for public housing (J.A. 104-108). At a hearing on that date, the City's attorney informed the district court that the City Council was trying to devise a politically acceptable plan, in which sites would be distributed "throughout the six wards," but the attorney could not assure the court that such a plan, or indeed any action by the City Council, would be forthcoming (J.A. 106, 108). The court reminded the City that the Advisor had been appointed and that his search for another plan had been undertaken as an alternative to civil contempt and other sanctions. The court stated that if the City Council did not pass a resolution within a week, the court would then assume that the Council did not intend to take any action (J.A. 106-108).

By July 1, 1987, the City had done nothing to advance its proposed alternative plan or otherwise comply with the Housing Remedy Order. Accordingly, on that date, on motions by the United States and the NAACP, the court entered an order requiring the City to take certain actions or risk contempt penalties. At the outset, the court found (J.A. 147):

> The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined re-

> peated opportunities accorded to the City to act itself in the first instance in taking remedial action.

The July 1 Order, among other things, required the City to seek Westchester County's waiver of its reverter interest in the County sites (J.A. 150).[8] The Order provided that the City's failure to comply would result in a finding of contempt; the City would be fined at a base rate of $100 for the first day, and the amount would double for each day of noncompliance thereafter (J.A. 151-152).

The City Council responded by enacting three resolutions on July 7, 1987. Two of the resolutions related to the County sites.[9] Resolution No. 140-1987 (J.A. 143) complied with the court's July 1 Order by requesting Westchester County to waive its reverter interest in the County sites. Resolution No. 141-1987 (J.A. 144-147) sought action by the County as to two of the three County sites, but expressly conditioned that request on the granting of a stay of constructon pending appeal, a limitation on the number of units of housing to be developed under the Long Term Plan, and other terms (J.A. 146-147). The resolution concluded (J.A. 147):

> BE IT FURTHER RESOLVED, that in the event that any portion of this Resolution is not complied with[,] the entire Resolution be deemed null and void and with no effect.

In a telephone conference on July 9, the City's attorney and the City Manager told the district court that the City Council did not intend in Resolution No. 141-1987 to supersede its request to the County set forth in Resolution No. 140-1987 (J.A. 120-122); they also assured the court that the City would comply with the court's Order by furnishing the court and the plaintiffs

---

[8] The July 1 Order directed the Advisor to submit a proposed plan for the placement of all 200 units of public housing on the identified unused school sites, and specified that the Advisor would no longer function as the City's representative but would act solely as an advisor to the court. The Order also required the City to adopt and submit to HUD an acceptable HAP for its current CDBG funding application. J.A. 147-150.

[9] In the third resolution, the City Council adopted the City's HAP for the fiscal year 1986 (J.A. 141).

with copies of the City's requests before their transmission to the County (J.A. 120-122, 131; see also J.A. 139, 150).

Despite these assurances (and without notice to the court or the plaintiffs), the City, on July 10, transmitted to the County only the request set forth in Resolution No. 141-1987, with its qualifications and conditions (J.A. 154-159). At a hearing on July 15, the court found that the City's action had sent "a clear message" to the County that the City wanted the County to grant only the request set forth in that resolution, and to reject the waiver request required by the court's order and embodied in Resolution No. 140-1987 (J.A. 160-162). Although the parties drafted and the City sent to the County a letter withdrawing the July 10 submission (J.A. 163-167), the County later refused to waive its reverter interest in any of the County sites.

c. During the remainder of 1987, with the County sites apparently then unavailable, the City persisted in its refusal to advance either the public housing or the Long Term Plan aspects of the Housing Remedy Order.[10] In the meantime, the district court, the plaintiffs, and the Advisor continued to seek additional available housing sites. By November, the court had designated four unused school sites for public housing. See *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1407 (S.D.N.Y. 1987).[11] Use of these four sites alone, however, would have resulted in a greater density than the parties agreed was optimal (see, *e.g.*, J.A. 65-67, 72, 97). And the City still had taken no steps to identify sites or strategies for the development of housing under the Long Term Plan. Accordingly, the district

---

[10] Although the Advisor and the City had identified potential housing sites (see, *e.g.*, J.A. 53-56, 115-117, 145), the City took no action to make them available for public housing.

[11] In its order requiring the Yonkers Board of Education to return to the City title to the unused school sites that had been designated for public housing, the court stated (675 F. Supp. at 1410):

> It will come as no surprise to anyone familiar with the history of this litigation that the City has acted in a negative or at best neutral fashion with respect to all efforts to implement the Court's Housing Remedy Order, and that any initiatives to further such implementation have come from the Plaintiffs, Plaintiff-Intervenors, or the Court itself.

court directed the Advisor to identify existing development projects in Yonkers, as well as privately owned vacant sites, that might be used to advance implementation of the Housing Remedy Order. *United States* v. *Yonkers Bd. of Educ.*, 675 F. Supp. 1413 (S.D.N.Y. 1987). Once again, the court gave the City the opportunity to chart the remedial course by choosing from among all the sites that had been or might be identified. *Id.* at 1415-1416.[12]

3. On December 28, 1987, the court of appeals affirmed the district court's liability and remedy orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988).[13] The court of appeals held that the requirements of the Housing Remedy Order were "plainly reasonable" and "necessary" in light of the City's "prior disregard of governmental urging that it select housing sites outside of Southwest," "its historical willingness to forgo federal funding in order to preserve segregrated housing patterns," "its past history of foot-dragging," and "its refusals to approve any site for low-income housing outside of" minority areas. 837 F.2d at 1236-1237.

---

[12] To prod the City to act, the court also imposed a freeze on all discretionary City actions in connection with four existing development projects in Yonkers until it was shown that these projects could not be used to advance the housing remedy goals, or until the City designated and obtained control of sites for all 200 units of public housing. In this order, the court recognized (675 F. Supp. at 1414):

> The progress to date in identifying available sites has been extremely disheartening and the attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.

[13] The court of appeals pointedly rejected as "frivolous" the City's contentions that its actions had not been racially motivated (837 F.2d at 1222).

4. For a brief period following the court of appeals' decision, the City finally seemed prepared to acknowledge and comply with its obligations under the Housing Remedy Order. That willingness, however, soon evaporated.

a. On January 19, 1988, the district court held a hearing at which it called upon the City to "advise what affirmative actions if any Yonkers is taking or planning to take to implement the housing remedy order" (J.A. 171). Counsel for the City responded that the parties had been negotiating an agreement on the actions the City would take (J.A. 178-181), but also conceded that the City had failed to submit a current HAP, as required by the original Housing Remedy Order and the July 1, 1987, Order (J.A. 171-174). The court stated that the City's submission of the HAP was a necessary first step to show a good faith effort to comply with the court's orders (J.A. 171, 175-176); accordingly, the court ordered the City to adopt the third-year HAP no later than January 21, 1988, or face contempt and bankrupting fines (J.A. 176-178).[14] After a recess, counsel for the City reported that a majority of the City Council had agreed to vote to adopt the HAP (J.A. 183-184). The court thereupon granted an adjournment until January 25 to enable the parties to continue settlement discussions on the other actions the City would take to comply with the Housing Remedy Order (J.A. 183-185).

On January 25, the parties informed the court that they had reached such an agreement in principle, designating seven sites for public housing and setting a goal of 800 units of housing to be developed under the Long Term Plan (J.A. 190-200).[15] The

---

[14] The court stated that it would notify the New York State Emergency Financial Control Board and the Governor of New York of any contempt adjudication (J.A. 176-178). Contrary to petitioner Chema's misleading suggestion (Chema Br. 5), the court's statement about replacing the City's elected officials with appointed officials (J.A. 182-183) referred not to action by the court itself but rather to possible action by those responsible state officers who have authority under state law to remove City officials from office. See Charter of the City of Yonkers art. II, § C2-5 (1966); Pet. App. 13a.

[15] At that proceeding, the court stated that if no agreement had been reached, it would have entered an order designating six public housing sites,

Yonkers City Council approved the agreement on January 27, and the district court entered the agreement, the "First Remedial Consent Decree In Equity" (Consent Decree) (J.A. 216-223), as a consent judgment on January 28 (Pet. App. 8a).

b. The Consent Decree set forth the actions the City would take in order to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order. Sections 12 through 18 of the Consent Decree established the framework for the Long Term Plan that had been left unresolved in the original Housing Remedy Order (J.A. 220-223). The Decree set a goal of 800 units of assisted housing to be developed over four years in conjunction with market rate housing developments (J.A. 220-221); it also committed the City to specific actions needed to encourage private developers to build such housing (J.A. 220-222). In Section 17 of the Decree, the City expressly agreed to adopt legislation conditioning the future construction of multi-family housing in Yonkers on the inclusion of at least 20 percent assisted units, and providing for such private development incentives as zoning changes, tax abatements, and density bonuses (the Mandated Incentives) (J.A. 222). This legislation was to be enacted within 90 days after entry of the Decree (*ibid.*).[16] In Section 18, the parties acknowledged that certain "subsidiary issues" relating to the Long Term Plan were unresolved and agreed to work toward their resolution in a second consent decree to be entered by February 15, 1988 (J.A. 222-223).

c. Faced with intense public opposition to the Consent Decree, the City soon sought to disavow it. On March 21, the

---

but did not suggest that it would have taken any action at that time with respect to the Long Term Plan (J.A. 204).

[16] The Consent Decree specifically provided (J.A. 220):

> There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

Additional measures that the parties agreed to forgo for a time included the use of City-owned land (J.A. 221).

City moved to modify the Decree, and even promised to return nearly $30 million in federal funds if it was relieved of its duty to allow the development of public housing in white neighborhoods (Pet. App. 9a).[17] The district court denied the City's motion on March 31. The City then refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree or to enact the legislation required by Section 17 (*id.* at 9a-10a).

Undaunted by the district court's order, the City, on May 2, moved to vacate the Decree in its entirety, on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Consent Decree as a whole (J.A. 225-244). Although the district court gave the City the opportunity to designate an alternative site, the City Council refused to do so. See J.A. 268-274; see also *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 859-861 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989). In denying the City's motion to vacate, the district court found that in light of "[t]he decision of the city council not to designate or authorize the court to designate a substitute site," the City's motion had been "a transparent ploy * * * to avoid any responsibility for the court decree or implementation of the housing remedy order" (J.A. 275). The City sought no further review of that ruling.

5. In the meantime, the plaintiffs and the court attempted to implement the Consent Decree despite the City's refusal to cooperate. On May 2, the plaintiffs moved the entry of a Long Term Plan Order based upon a draft that the City's lawyers had prepared before the City withdrew from negotiations. On June 13, following comments from the City (J.A. 245-261), revisions by the plaintiffs, and a hearing (J.A. 275-303), the district court entered its Long Term Plan Order resolving the subsidiary issues left open by the Consent Decree and providing the detail for the

---

[17] This amount represented the CDBG funds that the City had received from HUD following its promise to provide sites for 200 units of such public housing. See pp. 3-4 and note 6, *supra*.

legislation that Section 17 required (J.A. 303-316). That Order accommodated most of the City's substantive objections to the plaintiffs' proposal (Pet. App. 9a-10a).[18]

Nonetheless, the City and City Council continued their campaign of unyielding resistance. On June 14, the City Council passed a resolution declaring a moratorium on all public housing construction in Yonkers—an unabashed defiance of the district court's Housing Remedy Order and the Consent Decree (J.A. 317-319).[19] On June 21, nearly two months after the deadline set in the Consent Decree for the City's enactment of the necessary implementing legislation (and more than two years after entry of the original Housing Remedy Order), the district court asked the City for a timetable for enactment of the legislation (J.A. 323). The City's attorney stated that a consulting firm had been retained to draft the legislation, but that its work had not yet begun, and that no action could be considered by the City Council until August at the earliest (J.A. 323-324).

The prospect of waiting until summer's end for the City to comply disturbed the court, particularly in light of the City Council's declaration of a public housing moratorium just the week before. The Court thus asked the City Council to pass a resolution at its next meeting adopting the provisions of the Consent Decree and the Long Term Plan Order, with the enactment of the legislation itself to take place after the City's consultants completed their work (J.A. 324, 331-340). The City Council refused. Indeed, on June 28, the Council defeated a resolution that would have required the City to honor its

---

[18] The City opposed entry of the Long Term Plan Order principally on the ground that it was urging the court to vacate the Consent Decree entirely (J.A. 246; see also J.A. 256-258, 298-300). In the court of appeals, the City challenged only one substantive aspect of the Long Term Plan Order that concerned its state law authority to grant tax abatements (Pet. App. 31a). The court of appeals affirmed the entry of the Order (*id.* at 31a-32a). None of the petitioners challenges that aspect of the court of appeals' decision here.

[19] The City Council passed this resolution the day after this Court denied the City's petition for a writ of certiorari to review the court of appeals' affirmance of the district court's liability and remedy orders (108 S. Ct. 2821 (1988)).

previous commitments to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order (J.A. 345-346).

6. At the district court's request (J.A. 347-348), the United States and the NAACP then submitted a proposed order setting a timetable for the City's enactment of the legislation, under penalty of contempt (Pet. App. 10a). In response, the City informed the court on July 11 that it would "not voluntarily adopt the legislation contemplated by" the Long Term Plan Order and the Consent Decree (J.A. 351). Seeking to shirk all responsibility, the City suggested that the court simply enact the Long Term Plan legislation itself (*ibid.*).

In light of the City's response, the district court, at a conference on July 12, raised the possibility of creating a Yonkers Affordable Housing Commission. The proposed entity would be vested with "[a]ll of the governmental functions heretofore vested in the city council insofar as they relate to the housing envisioned by the housing remedy order, consent decree and long-term plan" (J.A. 358). The NAACP favored this alternative (J.A. 362-371, 388-392);[20] both the United States (J.A. 360-362, 385-386, 393) and the City (J.A. 377-379, 392-393) opposed it.[21] In opposing the Commission, the City expressly spoke for the City Council (J.A. 378):

> After giving the court's suggestion due consideration, the City Council wishes to convey its serious concerns regarding a proposal which would, in substance and effect,

---

[20] The NAACP urged the court to avoid taking the preliminary steps of imposing contempt sanctions. Instead, it advocated the court's taking control away from the recalcitrant City Council. See J.A. 363 ("In other words, no fines no jail and simply the most drastic action taken, which would be the stripping of the City of Yonkers' governmental officials directly of their responsibilities.").

[21] Contrary to its representation to this Court (City of Yonkers Br. 15), the City never altered its opposition in the district court to the creation of a Housing Commission, even when the imposition of contempt sanctions was imminent (J.A. 392-393, 403-404).

At the July 12 hearing, the City did favor direct action by the district court, simply ordering the legislation into effect without a vote by the City Council, but the court resisted, saying, "this court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or

> divest the Council of specific state law powers, including core legislative as well as executive functions. • • • The loss of those specifically granted powers must be viewed with great caution and concern from the perspective of a City Council which is popularly elected. As there is little doubt that the City Council would lack the power to delegate those functions to a Commission which is not popularly elected, it is therefore not in a position to consent to such a proposal.

On July 26, the United States proposed, and the district court entered, an order requiring the City, no later than August 1, to enact the legislation (known as the Affordable Housing Ordinance) that had been drafted by the City's consultants to implement the Consent Decree and the Long Term Plan Order (J.A. 397-400).[22] The July 26 Order also scheduled a hearing for August 2, at which time the City and the individual members of the City Council who voted against the ordinance would be required to show cause why each should not be held in civil contempt if the Affordable Housing Ordinance were not enacted (J.A. 398). The Order established the sanctions for such contempt: the City would be fined at a base rate of $100 for the first day and the fine would double for each day of noncompliance thereafter; the Council members would be fined $500 per day and imprisoned after 10 days of continued defiance (J.A. 398-399).[23] All sanctions would end if and when the City enacted the legislation (*ibid.*).[24] By letter dated July 28, in re-

---

power but rather a concept of what the proper role of a federal court is in a circumstance such as this" (J.A. 357).

[22] At a hearing on July 26, the City stated that, except for its previously expressed objections to the Long Term Plan (see pp. 12-13 and note 18, *supra*), it had no objections to the substance of the Affordable Housing Ordinance (J.A. 383-384).

[23] All fines would be paid into the Treasury of the United States and would not be refundable (J.A. 399).

[24] Since the City Council has enacted the ordinance (see p. 17, *infra*), petitioner Spallone is wrong in asserting, indeed boasting (Spallone Br. 3 & n.4, 7 n.11, 9 n.16), that he remains in contempt of court.

sponse to the City's concerns that state law required notice and public hearing before the City Council could vote on the Ordinance, the district court made clear that the July 26 Order would be satisfied if the City Council passed a resolution committing the City to enact the Ordinance after state law requirements had been met (J.A. 401). All petitioners had notice of the court's July 26 Order and its July 28 letter (Pet. App. 12a, 18a).

On August 1, by a vote of four to three, the City Council defeated a resolution declaring the City's intent to adopt the Affordable Housing Ordinance. All four petitioners voted against the resolution (J.A. 403, 420; Pet. App. 12a).[25] Consistent with the July 26 Order, the district court held show cause hearings on August 2 and 4 (J.A. 402-444, 452-476). Each of the petitioners appeared with counsel. Longo and Fagan stated that they had voted against the resolution because there had been no public hearing (J.A. 423-424, 428-429); Chema did not explain his vote (J.A. 436-437, 443).[26] Spallone stated that there were unspecified "serious problems" with the Affordable Housing Ordinance (J.A. 459), and contended that he was not obligated to vote as the court had ordered him to do (J.A. 470-473). Although the court specifically inquired (J.A. 424, 443, 459; see J.A. 474), none of the petitioners identified any substantive objections to the Ordinance. Neither the City (see J.A. 403-411) nor any of the Council members contended that the Affordable Housing Ordinance was inconsistent with the Consent Decree.

---

[25] At its August 1 meeting, the City Council scheduled for August 15 a public hearing on the Affordable Housing Ordinance, as required by state law. Following the August 15 hearing, the City Council again rejected the Ordinance by a vote of 4 to 3. Pet. App. 13a, 16a-17a.

[26] Chema's counsel argued that the court should have first held the City in contempt, and should have considered contempt against his client only if the City did not then comply (J.A. 436-438). In an affidavit submitted to the court of appeals (J.A. 506-508), Chema stated that the Long Term Plan did "nothing to address those people left behind in substandard housing on the West Side," and that the public had expressed its opposition to the adoption of the Long Term Plan legislation at the August 1 City Council meeting (J.A. 506-507).

Finding that their refusal to comply with the Consent Decree was "but the latest of a series of contempts" (J.A. 416), the district court adjudged the City and the four Council members in civil contempt and imposed sanctions in accordance with the July 26 Order (J.A. 416-417, 429-430, 443-444, 445-450, 475-476, 494-496).[27]

7. On August 17, the court of appeals stayed the contempt sanctions pending appeals by the City and the individual Council members (J.A. 510-511). On August 26, the court of appeals affirmed the adjudications of contempt against both the City and the Council members, but limited the fines against the City so that they would not exceed $1 million per day (Pet. App. 1a-35a). The court concluded that neither the City nor the Council members could escape responsibility for refusing to comply with the Consent Decree that the Council itself had approved (*id.* at 28a, 30a-31a).

8. On September 1, after this Court had stayed imposition of sanctions against the Council members pending timely filing and disposition of petitions for a writ of certiorari, but had denied the City's motion for a stay (J.A. 512), and with the City's contempt sanction approaching a fine of $1 million per day, the City Council finally enacted the Affordable Housing Ordinance (J.A. 528-557).[28] On the same date, the City Council passed resolutions stating its intent to amend the Ordinance and to move for a modification of the district court's orders relating to the 260 units of public housing (J.A. 558-559). At a con-

---

[27] In response to the Council members' contentions that they had been given inadequate time to prepare, the court allowed each of them until August 5 to request an evidentiary hearing that, if requested, would be held on August 8. The court ordered that all fines paid by the Council members would be held by the Clerk of the District Court until August 12, pending such a hearing. None of the Council members requested a hearing. J.A. 441-442, 475-476.

[28] The City paid a total of approximately $820,000 in contempt fines. The Council member petitioners each paid $3,500 in such fines. Pet. App. 190n-200n.

ference on September 14, the district court offered to consider proposed modifications, but none has ever been sought (*ibid.*).[29]

On March 6, 1989, this Court granted certiorari with respect to the Council members' petitions. 109 S. Ct. 1337. The City's petition for a writ of certiorari was denied. 109 S. Ct. 1339.

SUMMARY OF ARGUMENT

A. As this Court has squarely held, "[t]here can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966). This power extends not only to parties to the action but to those in privity with them, including their officers, agents, and employees. See Fed. R. Civ. P. 65(d), 70, 71; *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945). In this case, the record shows that petitioners, as officers of the City of Yonkers and members of the City Council, obstructed the City's compliance with the district court's orders to remedy illegal racial segregation of the City's public and subsidized housing—the initial Housing Remedy Order, the Consent Decree, the Long Term Plan Order, and finally the July 26 Order. This pattern of disobedience is precisely the type of conduct that traditionally has warranted the considered exercise of a court's civil contempt power. Under these circumstances, the district court acted well within appropriate bounds in exercis-

---

[29] Within days, the City's and the City Council's willingness to implement the Housing Remedy Order (or to acknowledge the district court's authority to do so if the City refused) was again tested. On September 22, the court of appeals issued its decision in *Yonkers Racing Corp.* v. *City of Yonkers*, *supra*, directing the district court and the parties to seek an alternative to the Seminary site as a location for public housing. 858 F.2d at 872; see p. 12, *supra*. The City flatly refused to cooperate in this process, because "there [was] not majority council support for any site to replace the seminary" (Oct. 4, 1988, Tr. 8). The City made clear that it would not propose or support any alternate site, would not propose that the court designate a site from a list furnished by the parties, would not support the appointment of a commission to designate a site, and would not acknowledge the court's authority to designate a site (*id.* at 5-15).

ing its civil contempt power in order to bring about the long overdue compliance with federal court orders vindicating federal constitutional and statutory rights.

B. Although they challenge the imposition of contempt sanctions on a number of grounds, petitioners essentially advance one unsettling proposition: as members of a local legislative body, they are entitled deliberately to flout valid federal court orders, including the Consent Decree that the City Council itself had approved. That proposition is unacceptable. It is wrong as a matter of federal law, this Court's precedents, and principles of orderly government.

This Court has never considered the common law doctrine of legislative immunity as a license to disobey federal court orders. To the contrary, the Court has emphasized that all government officials, including legislators, are bound to comply with federal law and with the application of that law by the federal courts. *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958); *Butz* v. *Economou*, 438 U.S. 478, 506 (1978). Nothing is more fundamental to our system of ordered liberty and the rule of law than the solemn obligation of all citizens, and especially public officials, to obey the law.

Consistent with this overarching principle, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester* v. *White*, 108 S. Ct. 538, 542 (1988). Even with respect to *federal* legislative immunity created by the Speech or Debate Clause (U.S. Const. Art. I, § 6, Cl. 1), the Court "has been careful not to extend the scope of the protection further than its purposes require." *Forrester*, 108 S. Ct. at 542. The context of petitioners' actions here—local legislators' interference with and obstruction of federal court orders designed to remedy federal constitutional and statutory violations—precludes application of immunity doctrine to insulate petitioners from contempt sanctions.

In applying the doctrine of immunity to local legislators, this Court has looked to federal common law as a source of authority. The common law tradition offers no support for extending immunity to local legislators from actions to enforce compliance with federal court orders entered against their govern-

ments. To the contrary, federal courts have not hesitated to hold local legislators in contempt for refusing to comply with federal court mandates.

Extending absolute immunity to local legislators in this setting would not be "justified by overriding considerations of public policy." *Forrester*, 108 S. Ct. at 542. Far from it. When a federal court issues a decree requiring action by a local government, individual legislators, as officers of that government, have a duty to abide by that order. They may not, at their discretion, choose to obstruct compliance with the decree. Holding a legislator liable for breaching that duty does not interfere with his legislative independence because the underlying order itself has already circumscribed the legislator's discretion to act. Similarly, withholding absolute immunity from local legislators in those circumstances will not unduly interfere with the independence of the local legislature itself. Once a federal court enters an order establishing a local government's liability for certain activities, the court necessarily limits the local government's discretion in connection with those activities. In that situation, local officials, as officers of that government, have a firm duty to remedy the violations of federal law. Cf. *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 458-461 (1979).

Thus, while federal courts must be "sensitiv[e] to interference with the functioning of state [or local] legislators," *United States* v. *Gillock*, 445 U.S. 360, 372 (1980), principles of comity cannot empower local legislators to defy valid federal court orders. That sort of power "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." *United States* v. *Nixon*, 418 U.S. 683, 707 (1974). Indeed, it would effectively authorize obstruction of a court's enforcement of federal law by the individuals with the greatest power to do so—those holding the police, the spending, and (of particular importance here) the zoning and condemnation powers of the State or locality.

Supreme Court of Virginia v. *Consumers Union*, 446 U.S. 719, 730-734 (1980), upholding a claim of legislative immunity in a Section 1983 action for injunctive relief against state officials acting in their legislative capacity, does not support such

a claim in the circumstances of this case. Where, as here, action against the Council members was taken at the remedial stage of litigation after repeated frustration of the court's orders; where action by the City Council was necessary to remedy the City's statutory and constitutional violations; and where the City Council itself had voluntarily assumed obligations under the Consent Decree, the immunity recognized in *Consumers Union* should not apply.

C. Nor does the First Amendment shield petitioners from sanctions for obstructing the City's compliance with the court's orders, and particularly for their refusal to vote for the implementing legislation required by the Consent Decree. To the extent the First Amendment applies at all to a legislator's act of voting in his official capacity, petitioners cannot claim such protection here. Petitioners were free to express their views on the merits of the Affordable Housing Ordinance both on and off the Council floor. Compliance with the court's orders, however, required them to perform an official *act*: adopting the Affordable Housing Ordinance. That their official duty to perform this act necessitated use of a word, or words, no more infringes the First Amendment than would a requirement that a public officer issue an order to a subordinate or execute a deed of conveyance. The burden placed on the public official is a result of his official duty and is "unquestionably" justified by "the public interest in obtaining compliance with federal court judgments that remedy constitutional violations" (Pet. App. 28a).

D. Finally, petitioners are misguided in suggesting that the court should have assumed the City Council's legislative duties or transferred those duties to an independent court-appointed commission. Either alternative would have represented a more intrusive use of federal judicial power—the direct exercise of local legislative authority by a federal court—than did invocation of a traditional, well-established judicial remedy. Given the availability of the time-honored remedy of civil contempt, such a step would have done unnecessary violence to democratic values. What is more, neither of petitioners' suggestions would have achieved the important goal of obtaining both present and

future compliance with valid court orders, including the Consent Decree approved by the Council itself. Although such alternatives presumably would have brought about the adoption of the Affordable Housing Ordinance, enactment of the Ordinance was essentially the beginning, not the end, of compliance. Moreover, when the confrontation between federal and local authority was of the City's and the City Council's making, the district court properly exercised its discretion by refusing to surrender to the Council's attack on its authority and by requiring the City and City Council to live up to their commitments.

ARGUMENT

THE DISTRICT COURT PROPERLY IMPOSED CIVIL CONTEMPT SANCTIONS AGAINST INDIVIDUAL MEMBERS OF THE YONKERS CITY COUNCIL FOR OBSTRUCTING THE CITY OF YONKERS' COMPLIANCE WITH VALID COURT ORDERS

A. The District Court Has Authority To Impose Civil Contempt Sanctions Against Individual Members Of The Yonkers City Council For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

1. It is a fundamental aspect of judicial authority that "courts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani* v. *United States*, 384 U.S. 364, 370 (1966).[10] As the Court has recognized, "[t]he interests of orderly government demand that respect and compliance be given to orders issued by courts * * *." *United States* v. *United Mine Workers*, 330 U.S. 258, 303 (1947). The contempt power, therefore, "has been uniformly held to be necessary * * * to enable [federal courts] to enforce [their]

---

[10] See, *e.g.*, *United States* v. *United Mine Workers*, 330 U.S. 258, 304-307 (1947); *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). See also *Young* v. *United States ex rel. Vuitton*, 481 U.S. 787, 793 (1987) ("it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders"); 18 U.S.C. 401.

judgments and orders necessary to the due administration of law and the protection of the rights of suitors." *Bessette* v. *W.B. Conkey Co.*, 194 U.S. 324, 333 (1904).[31] The reach of this essential power extends not only to the parties themselves but to those in privity with them, including their officers, employees, and agents. See Fed. R. Civ. P. 65(d), 70, 71.[32]

2. In this case, the record plainly shows (and petitioners do not seriously dispute) that petitioners, over a period of time as officers of the City of Yonkers and members of the City Council, obstructed the City's compliance with four district court orders to remedy longstanding and continuing federal constitutional and statutory violations flowing from racial segregation of the City's public and subsidized housing.[33] The Housing Remedy Order, specifically directed to "[t]he City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them" (J.A. 20),

---

[31] In *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. at 450 (1911), the Court observed:

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls "the judicial power of the United States" would be a mere mockery.

[32] See, *e.g.*, *Gunn* v. *University Committee*, 399 U.S. 383, 389 (1970); *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945); *In re Lennon*, 166 U.S. 548, 554 (1897); *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (L. Hand, J.).

[33] Indeed, the City itself concedes that "there was contumacious conduct" (City of Yonkers Br. 12).

Each of these four orders was final and binding on the City. The court of appeals affirmed the Housing Remedy Order and this Court denied review. *United States* v. *Yonkers Bd. Of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, 108 S. Ct. 2821 (1988). The district court denied the City's motion to vacate the Consent Decree and the City sought no further review of that ruling. See pp. 11-12, *supra*. The court of appeals upheld the district court's entry of the Long Term Plan Order (Pet. App. 31a-32a), and neither the City nor petitioners sought review of that ruling in this Court. Finally, the court of appeals upheld the July 26 Order and the adjudication of contempt against the City (*id.* at 28a-31a), and this Court denied the City's petition for review. 109 S. Ct. 1339 (1989).

established the City's obligation to propose and implement the Long Term Plan. The City and City Council, however, steadfastly refused to comply with that Order. See pp. 4-9, *supra*.

The Consent Decree, adopted more than a year and a half after entry of the Housing Remedy Order, further defined the terms of the Long Term Plan and required the City and the City Council to enact the necessary legislation to implement the Plan (J.A. 222). Again, the City and the City Council had the legal duty to enact legislation in accordance with the Decree and to negotiate in good faith on its details. Yet again, the City and the City Council continued their program of steadfast resistance, highlighted by the City Council's resolution of June 14, 1988, declaring a moratorium on all public housing construction in Yonkers. See pp. 11-13, *supra*. The district court's entry of the Long Term Plan Order, as a result of the recalcitrance of the City and the City Council, defined precisely the steps to be taken by responsible City officials to remedy segregated public and subsidized housing. Yet, the City Council refused to budge; it responded on June 28 by defeating a resolution that would have required the City to honor its previous commitments to implement the Housing Remedy Order, the Consent Decree, and the Long Term Plan Order (J.A. 345-346).

It was only at this juncture that the district court entered its July 26 Order, incorporating the Affordable Housing Ordinance (drafted by the City's consultants in accordance with the Long Term Plan Order), requiring enactment of the Ordinance by a certain date, and establishing sanctions for noncompliance. Consistent with its previous stance, the City Council, with petitioners leading the charge, acted in defiance of the court's order, thereby preventing the City once again from achieving compliance. See pp. 15-17, *supra*.[14]

---

[14] Certain petitioners contend (Chema Br. 45-47; Longo and Fagan Br. 22-26) that the Affordable Housing Ordinance and the Long Term Plan from which it was drawn are inconsistent with the Consent Decree. Petitioners did not raise this issue in the district court or in the court of appeals, and they have therefore not preserved it for review. *E.g., United States* v. *Lovasco*, 431 U.S.

3. In this situation of deliberate noncompliance with remedial orders, the district court possesses authority to exercise its contempt power to secure compliance. *First*, the record belies the suggestion that petitioners "were in a very real sense strangers" to the litigation and the court's orders (Longo and Fagan Br. 28). Petitioners, as members of the City Council, actively participated in the remedial process; indeed, they thwarted that process by deliberate steps aimed at obstructing the City's compliance with the court's valid orders. That is precisely the type of conduct that traditionally has warranted exercise of a court's civil contempt power. See, *e.g.*, *In re Lennon*, 166 U.S. at 548; *United States* v. *Hall*, 472 F.2d 261, 264-267 (5th Cir. 1972) (Wisdom, J.); *Griffin* v. *County School Bd.*, 363 F.2d 206, 207 (4th Cir. 1966) (en banc).

Second, the district court is not disabled from exercising its power because petitioners were not named parties in the underlying litigation. Federal Rule of Civil Procedure 65(d) reflects the well-settled rule that "[t]o render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have

---

783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, this belated point is without merit since the Long Term Plan Order and Affordable Housing Ordinance are fully consistent with the Consent Decree. Nothing in the Ordinance contradicts the Consent Decree's proviso requiring only zoning changes that "are not substantially inconsistent with the character of the area" (J.A. 222). In fact, Article V of the Ordinance expressly requires that "the provisions of the underlying zoning * * * [and] the impact of development on surrounding land uses and neighborhoods" be taken into account before allowing "[d]epartures from [existing] zoning regulations" (J.A. 548). And all such zoning changes must be submitted to the Yonkers Planning Board for its approval (J.A. 550-554). Nothing in the Consent Decree suggested that the City Council was to have the power to vote on each proposed zoning change. Indeed, before the district court, the City objected to the creation of a separate "Implementation Office" to assist developers, arguing that this function should be carried out not by the City Council but by the City's planning department. The district court ordered the creation of a separate office, and neither the City nor the petitioners sought further review of that ruling.

been actually served with a copy of it, so long as he appears to have had actual notice." *In re Lennon*, 166 U.S. at 554. In addition, the initial Housing Remedy Order specifically enjoined petitioners, as "officers" of the City,[35] to take steps to remedy the City's constitutional and statutory violations; the district court's subsequent orders implicitly mirrored that directive. Petitioners are therefore in no position to evade the district court's contempt process. See Fed. R. Civ. P. 71; *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945).

Third, the Consent Decree, which the City Council itself approved, reconfirmed the district court's authority to proceed against petitioners for obstructing the City's compliance. Contrary to petitioners' sweeping contentions (Spallone Br. 36-40; Chema Br. 38-40, 43-44; Fagan and Longo Br. 26-28), the Decree bound *all* members of the City Council to comply with specific court-ordered obligations, whether petitioners personally agreed to it or not. Fed. R. Civ. P. 65(d); see *Regal Knitwear Co.*, 324 U.S. at 14-15. The City Council's approval of the Decree was "not the action of any separate member or number of members, but the action of the body as a whole." *United States* v. *Ballin*, 144 U.S. 1, 7 (1892). "When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order[s]." *United States* v. *Fleischman*, 339 U.S. 349, 356-357 (1950).

As members of the Yonkers City Council, petitioners were subject to the district court's orders directing the City of Yonkers to remedy its illegal racial segregation of public and subsidized housing. When petitioners embarked on a continuous course of conduct to block the City's efforts to comply

---

[35] Under state law, petitioners, as members of the Yonkers City Council, are "officers" of the City of Yonkers. See N.Y. Pub. Off. Law § 2 (McKinney 1952).

with those orders, the district court acted well within the traditional bounds of judicial authority.

B. The Doctrine Of Legislative Immunity Does Not Shield Individual Members Of The Yonkers City Council From Sanctions For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

In the face of this justifiable exercise of the federal court's contempt power, petitioners each contend (Spallone Br. 19-35; Chema Br. 24-32; Longo and Fagan Br. 11-20) that the doctrine of legislative immunity absolves them from any obligation to comply with the district court's orders and shields them from sanctions for their decision to obstruct the City's compliance with those orders. This cannot be. This Court has never considered the common law doctrine of legislative immunity as a license to disobey federal court orders, especially orders aimed at remedying basic violations of federal constitutional and statutory law. On the contrary, the Court has emphasized that all government officials, including legislators, are bound to comply with federal law, and with federal courts' application of that law. As the Court stated in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958), "[n]o state legislator * * * can war against the Constitution without violating his undertaking to support it." See *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) ("all individuals," whatever their position in government, are subject to federal law").

Consistent with this overarching principle, the Court "has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester* v. *White*, 108 S. Ct. 538, 542 (1988). The Court specifically "has been careful not to extend the scope of the protection [of immunity] further than its purposes require." *Ibid.* Thus, contrary to petitioners' broad assertions, neither this Court's precedents, the federal common law of immunity, nor considerations of public policy serve to insulate petitioners' conduct from a federal court's authority to enforce its own orders.

1. This Court's leading decisions recognizing immunity for state or regional legislators arose out of actions in which private

plaintiffs sought to hold legislators liable under the Civil Rights Act of 1871, 42 U.S.C. 1983. In *Tenney* v. *Brandhove*, 341 U.S. 367, 376, 379 (1951), the Court concluded that Congress, in enacting that statute, had not intended to abrogate the common law immunity enjoyed by state legislators. It thus held that state legislators are immune from Section 1983 damages liability for their legislative acts. The Court extended this common law immunity from damages actions to members of a two-state regional planning commission in *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 402-406 (1979). And in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 730-734 (1980), the Court upheld a claim of legislative immunity in a Section 1983 action for injunctive relief brought against members of a state Supreme Court for their refusal to amend the state bar code to permit attorney advertising.[16]

The recognition of legislative immunity under Section 1983, which is explicitly grounded on common law practices, serves two principal purposes. First, the immunity protects individual state legislators from the hazards and distractions of litigation resulting from decisions they must make in carrying out their legislative duties, a purpose shared by all common law official immunities. *E.g.*, *Tenney*, 341 U.S. at 377; *Lake Country Estates*, 440 U.S. at 405; see *Forrester*, 108 S. Ct. at 543. Second, the immunity, based on traditional principles of comity, guards against undue federal interference with state legislative functions. See *Consumers Union*, 446 U.S. at 731-733; *United States* v. *Gillock*, 445 U.S. 360, 370-373 (1980).

The Court has made clear (445 U.S. at 370), however, that "federal interference in the state legislative process is not on the same constitutional footing" as federal judicial interference with the affairs of Congress. The latter raises a question of separation of powers between coequal branches, a question explicitly addressed by the Speech or Debate Clause of Art. I, § 6, Cl. 1 of the Constitution. Thus, "where important federal interests are

---

[16] The Court allowed suit against the same defendants in their enforcement capacities. See note 45, *infra*.

at stake [in the actions of state legislative officials], as in the enforcement of federal criminal statutes [against those officials], comity yields." 445 U.S. at 373.[37]

2. The civil contempt proceedings against the individual members of the City Council in this case were designed to stop those members from obstructing the City's compliance with valid federal court orders – orders entered in a civil rights action brought by the United States against the City to redress the City's longstanding violations of the Constitution and federal civil rights laws. The context of this case is therefore far removed from the circumstances in which this Court has upheld claims of legislative immunity – private actions brought directly against state legislators in the first instance seeking monetary or injunctive relief as a result of particular legislative decisions.[38] It

---

[37] In *United States* v. *Gillock*, 445 U.S. 360, 373 (1980), the Court therefore held that state legislators may not invoke the doctrine of legislative immunity to claim an evidentiary privilege in a criminal prosecution. See also *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974) ("the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress * * *' " (quoting *Gravel* v. *United States*, 408 U.S. 606, 627 (1972)).

[38] Although this Court has not resolved the question, see *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 n.26 (1979), the courts of appeals have agreed that local legislators – like their state counterparts – are immune from private actions brought under Section 1983 that challenge their legislative decisions. See *Aitchison* v. *Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed* v. *Village of Shorewood*, 704 F.2d 943, 952-953 (7th Cir. 1983); *Espanola Way Corp.* v. *Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983); *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1349-1350 (9th Cir. 1982); *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1193-1194 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Bruce* v. *Riddle*, 631 F.2d 272, 274-279 (4th Cir. 1980); *Gorman Towers* v. *Bogoslavsky*, 626 F.2d 607, 611-614 (8th Cir. 1980). The Second Circuit assumed the correctness of those decisions (Pet. App. 25a), but recognized that such immunity could not relieve petitioners of their obligation to comply with federal court orders remedying violations of federal law, at least where the City Council itself had approved the Consent Decree that required them to enact the remedial legislation (*id.* at 25a-28a).

This case does not present the question whether local legislators are immune from liability under 42 U.S.C. 1983 or the Fair Housing Act. For that reason,

is precisely this difference in context that argues powerfully against application of legislative immunity to shield petitioners' actions from legal process.

a. Federal common law traditionally has not extended to local legislators an immunity from actions to enforce compliance with federal court orders entered against municipal or county governments. In reliance on the "widely followed common-law rule that only discretionary functions are immune from liability," *Westfall* v. *Erwin*, 108 S. Ct. 580, 584 n.4 (1988), federal courts have recognized that local legislators have no license to defy valid court judgments. See, *e.g.*, *Amy* v. *The Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870) (county legislators held liable in damages for refusing to comply with federal court judgment against the county).[39] When confronted with disobedience to federal court judgments entered after local governments had defaulted in their obligations to bondholders, this Court has held that federal courts may issue writs of mandamus to compel local legislatures to satisfy those judgments. See, *e.g.*, *Yost* v. *Dallas County*, 236 U.S. 50 (1915); *East St. Louis* v. *Amy*, 120 U.S. 600 (1887); *Mobile* v. *Watson*, 116 U.S.

---

and because the Second Circuit assumed that petitioners were entitled to the same immunity available to state legislators, this case does not present an occasion for the Court to decide the issue left unresolved in *Lake Country Estates*.

Significantly, all of the decisions cited above involved local legislators' immunity from actions for *damages* under Section 1983, and did not address the question of their immunity from actions for injunctive relief. As discussed at pp. 30-32, *infra*, in light of this Court's decisions approving the issuance of court orders to compel legislative action where necessary to execute federal court judgments, it is apparent that local legislators are not immune from injunctive relief in all circumstances. Correspondingly, we submit, they must also be subject to the courts' inherent contempt powers to enforce that relief.

[39] In *Amy* v. *The Supervisors*, 78 U.S. (11 Wall.) at 138, the Court observed:

> The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect.

289 (1886); *Labette County Commissioners* v. *Moulton*, 112 U.S. 217 (1884); *County Commissioners* v. *Wilson*, 109 U.S. 621 (1883); *Commissioners* v. *Sellew*, 99 U.S. 624 (1878).[40] As the Seventh Circuit noted a generation ago, "[c]ourts have for years compelled city councils to do their legal duty, though the performance of that duty may require the exercise of discretion and be in the performance of legislative functions * * *." *Connett* v. *City of Jerseyville*, 125 F.2d 121, 124 (7th Cir. 1942).

Under this established common law tradition, individual legislators may not only be held liable in damages for refusing to comply with federal court orders, they may also face contempt sanctions for their disobedience, see, *e.g.*, *Commissioners* v. *Sellew*, 99 U.S. at 627.[41] In *Sellew*, the Court stated (*ibid.*):

> When a copy of the writ which has been ordered is served upon the clerk of the [County Board of Commissioners], it will be served on the [County], and be equivalent to a command that the persons who may be members of the board

---

[40] Accord *Rees* v. *City of Watertown*, 86 U.S. (19 Wall.) 107 (1873); *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *City of Galena* v. *Amy*, 72 U.S. (5 Wall.) 705 (1866); *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1866); *Supervisors* v. *United States*, 71 U.S. (4 Wall.) 435 (1866); *Board of Commissioners* v. *Aspinwall*, 65 U.S. (24 How.) 376 (1860).

[41] For lower court adjudications of contempt, see, *e.g.*, *In re Copenhaver*, 54 F. 660, 668 (C.C.W.D. Mo. 1893) (justices of county court acting as legislative body); *United States* v. *Green*, 53 F. 769, 772 (C.C.W.D. Mo. 1892) (city aldermen); *The President ex rel. Moran* v. *Mayor*, 40 F. 799, 805 (C.C.D.N.J. 1889) (city council members); *United States ex rel. Thompson* v. *Lee County*, 26 F. Cas. 911, 914 (C.C.N.D. Ill. 1869) (No. 15,589) (county board of supervisors). See also *United States ex rel. Jones* v. *City of West Palm Beach*, 94 F.2d 320, 321-322 (5th Cir. 1938); *United States ex rel. Watts* v. *Justices of Lauderdale County*, 10 F. 460, 461-462 (C.C.W.D. Tenn. 1882); *United States ex rel. Huidekoper* v. *Buchanan County*, 24 F. Cas. 1288, 1289 (C.C.W.D. Mo. 1878) (No. 14,679).

State courts have also followed the common law practice of not extending to local legislators an immunity from actions to enforce compliance with court orders. See, *e.g.*, *State ex rel. Baumann* v. *Judge*, 38 La. Ann. 43, 44-45 (1886) (members of city council held in contempt); *State ex rel. Edwards* v. *District Court*, 41 Mont. 369, 373-377, 109 P. 434, 436-437 (1910) (city aldermen held in contempt); *People ex rel. Pierce* v. *Guggenheimer*, 44 App. Div. 399, 400, 60 N.Y.S. 703, 705 (1899) (members of city council held in contempt).

> shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for contempt.

The common law tradition thus offers no support for extending immunity to local legislators from actions to enforce compliance with federal court orders entered against their governments.

b. In the context of this case, extending such immunity to local legislators is not "justified by overriding considerations of public policy." *Forrester,* 108 S. Ct. at 542. To the contrary, when a federal court issues a decree requiring local governmental action, individual legislators incur a duty to abide by that order. They are not at liberty to obstruct compliance. *E.g., Sellew,* 99 U.S. at 627. Holding a legislator liable for breaching that duty (by obstructing the court's order) does not interfere with his legislative independence; his discretion to act has already been circumscribed by the underlying order itself. For the same reason, the absence of immunity will not subject individual legislators to the risk of liability "for mere mistakes in judgment." *Butz,* 438 U.S. at 507; see *Westfall,* 108 S. Ct. at 584.[42]

Similarly, holding legislators liable to contempt sanctions for obstructing compliance with federal court orders will not subject them to proceedings based "upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney,* 341 U.S. at 377. Legislators can avoid such proceedings by carrying out their fundamental duty to obey court orders. Should they thwart those orders and persist in such disobedience, legislators can (and should) anticipate the resulting contempt proceedings, in which their liability would be objectively determined, without

---

[42] In *Westfall,* 108 S. Ct. at 584, this Court recognized:

> When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. * * * Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity.

regard to their motive or intent. See *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

To be sure, in fashioning the remedy, a court should be mindful of legislative prerogatives and give due respect to the views of local authorities. *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). But where, as here, local authorities default in their legal obligations and then actively obstruct compliance with the court's orders, the court must prescribe the remedy (*id.* at 15-16). In those circumstances, the court "has not merely the power but the duty to render a decree which will so far as possible" remedy the violation. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

This by no means suggests that legislators are left, as petitioners would have it, to the whim of a single judge clothed with Article III power. Once the court enters its decree, the appellate process provides a safeguard against unlawful or unnecessary remedial requirements. But if the order is neither stayed nor overturned, then the local government has the clear duty to implement the decree, see *United Mine Workers*, 330 U.S. at 293, a duty shared by the municipality's officers, including members of its governing legislative body. See *Fleischman*, 339 U.S. at 356-357 (quoted at p. 26, *supra*); *Regal Knitwear Co.*, 324 U.S. at 13-14; *Commissioners* v. *Sellew*, 99 U.S. at 627; Fed. R. Civ. P. 65(d).[43]

---

[43] Cf. *Bush* v. *Orleans Parish School Bd.*, 191 F. Supp. 871 (E.D. La.), aff'd *sub nom. Denny* v. *Bush*, 367 U.S. 908 (1961) (state legislature enjoined from obstructing local school desegregation orders).

In an earlier decision, the three-judge court in *Bush* had disclaimed an intention to enjoin the state legislature in its performance of any legislative function. See *Bush* v. *Orleans Parish School Bd.*, 188 F. Supp. 916, 922 (E.D. La. 1960). In the later decision cited above, however, the court determined that the legislature's enactment of statutes designed to interfere with the desegregation of the Orleans Parish Schools was a plain violation of the court's orders. 191 F. Supp. at 873. Accordingly, the court ultimately enjoined the legislature from seeking to enforce those statutes "and from otherwise interfering in any way with the operations of the public schools * * * pursuant to the orders of this court." *Id.* at 879.

Thus, while the courts must be "sensitiv[e] to interference with the functioning of state [or local] legislators," *Gillock*, 445 U.S. at 372, principles of comity do not, and should not, license local legislators to defy valid federal court orders. Such an immunity "would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Art. III." *United States* v. *Nixon*, 418 U.S. at 707. Moreover, it would effectively authorize obstruction of a court's enforcement of federal law by the individuals with the greatest power to do so—those holding the police, the spending, and (of particular importance here) the zoning and condemnation powers of the state or locality. See *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964).[44] Indeed, as the City acknowledges (City of Yonkers Br. 9), an extension of immunity to City Council members in this context would "in a very real sense [place] a Sword of Damocles over [the City's] head." The City thus realizes that if legislative immunity were granted, it could be faced with heavy fines, and even bankruptcy, as a result of actions by those who knew in advance that they ran no individual risk of contempt.

3. The record establishes (see pp. 4-17, *supra*) that petitioners, as individual members of the Yonkers City Council, obstructed the City's compliance with the district court's orders to remedy racial segregation of the City's public and subsidized housing. Each of those orders (see note 33, *supra*)—the initial Housing Remedy Order, the Consent Decree, the Long Term Plan Order, and the July 26 Order—progressively narrowed the options available to the City and City Council to conform to

---

[44] Indeed, the Yonkers City Council not only exercises all legislative authority on behalf of the City (see Charter of the City of Yonkers art. III, § C3-1.A (1966) (Pet. App. 209a)); it also exercises considerable executive authority, including the power to appoint the City Manager, "the chief executive and administrative officer of the city." *Id.* art. IV, § C4-1. The City Manager remains in office at the pleasure of the City Council and "may be removed, in the absolute discretion of the Council, by [an appropriate] resolution." *Id.* art. IV, § C4-2; see also J.A. 521-522. This concentration of governmental authority in the City Council highlights the dangers to government under law of extending to local legislators an immunity from complying with federal court decrees.

constitutional and statutory requirements. With the court's entry of the July 26 Order, the City Council's mandate was defined precisely—the Council was either to enact by August 1 the ordinance drafted by the City's consultants in accordance with the Long Term Plan, or face specific contempt sanctions. In sum, petitioners brought contempt sanctions on their own heads by preventing the City, acting through the City Council, from adopting the ordinance in accordance with the district court's orders and the City's own commitments.

This case is thus quite different from *Consumers Union*, 446 U.S. at 730-734, where the Court held that the doctrine of legislative immunity barred a Section 1983 action for injunctive relief. Contrary to petitioners' passing suggestions (Spallone Br. 32; Chema Br. 30), *Consumers Union* does not, for reasons discussed below, support extending to local legislators an immunity from actions to enforce compliance with federal court orders entered against their governments.

a. In *Consumers Union*, plaintiffs filed an action against the members of the Supreme Court of Virginia, in their legislative capacities, for failing to amend the state bar code in light of *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). The *Bates* decision, however, was not a court decree that enjoined the Supreme Court of Virginia or the State for which it was acting. Nor did the ruling in *Bates* impose a precisely defined duty on state bar authorities to amend their respective ethical codes. See *Bates*, 433 U.S. at 383-384.

Here, in contrast, petitioners were personally subjected to legal proceedings only after judgment had been entered against the City; the City had defaulted in its remedial obligations largely as a result of petitioners' efforts; the Council itself had agreed to enact the necessary legislation; and the terms of that legislation had been precisely defined. Where the "duty sought to be enforced [was] clear and indisputable" (*Board of Commissioners* v. *Aspinwall*, 65 U.S. (24 How.) 376, 382 (1860)), petitioners had neither the authority nor an occasion to "exercise judgment and discretion" (*Kendall* v. *Stokes*, 44 U.S. (3 How.) 86, 98 (1845)) in refusing to obey court orders and in obstructing the City's compliance.

b. In *Consumers Union,* the plaintiffs' rights could be vindicated through an injunction barring enforcement of the offensive provisions of the state bar code.[45] See 446 U.S. at 734-737. Here, implementation of the Long Term Plan depended upon enactment of legislation; under the Yonkers City Charter, the City Council enjoys exclusive authority to carry out that task. See note 44, *supra.* Where action by the City Council was necessary to remedy the City's statutory and constitutional violations, the court plainly had authority to compel that action. *Griffin* v. *County School Bd.,* 377 U.S. 218, 233 (1964); *Alexander* v. *Holmes County,* 396 U.S. 19, 21 (1969);[46] see

---

[45] Indeed, rather than seeking an injuction requiring the Supreme Court of Virginia to amend the state bar code, the plaintiffs sought a declaratory judgment and an injunction barring enforcement of the code's advertising provisions. See 446 U.S. at 726. And this Court upheld that relief against the Supreme Court of Virginia in its enforcement capacity. *Id.* at 736. In analyzing applications of legislative immunity, this Court has paid careful attention to the availability of other means of correcting or deterring illegal official conduct. See, *e.g., United States* v. *Gillock,* 445 U.S. at 372-373 (criminal sanctions available); *O'Shea* v. *Littleton,* 414 U.S. at 503 (criminal sanctions available); *Powell* v. *McCormack,* 395 U.S. 486, 503-506 (1969) (relief available against congressional employees).

[46] As this Court recognized in *Brown II,* 349 U.S at 301, dismantling entrenched systems of segregation and discrimination may require "revision of local laws and regulations." Thus, legislative actions by boards of education, city councils, and other local legislative bodies are often essential aspects of the remedy in civil rights cases. In school desegregation cases, courts have required school boards to formulate, adopt, and implement desegregation plans. See, *e.g., Columbus Bd. of Educ.* v. *Penick,* 443 U.S. 449, 453-455 (1979); *Green* v. *County School Bd.,* 391 U.S. 430, 442 (1968). In actions brought under the Fair Housing Act, courts have ordered local legislatures to take a variety of legislative actions. See, *e.g., United States* v. *City of Parma,* 661 F.2d 562, 577 (6th Cir. 1981) (upholding order requiring city to enact welcoming ordinance), cert. denied, 456 U.S. 926 (1982); *Lac Vieux Desert Band of Lake Superior Indians* v. *Waterssmeet Township,* No. M82-161 CA (W.D. Mich. Sept. 2, 1987), slip op. 4 (remedial order enjoins township from levying taxes on Indian housing project); see *United States* v. *Town of Cicero, Illinois,* No. 83 C 413 (N.D. Ill. May 15, 1986), slip op. 6 & App. A (consent decree requires town to enact specific Fair Housing Resolution). And in actions brought under the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.,* courts have directed legislative bodies to formulate and adopt election plans in

Bond v. *Floyd*, 385 U.S. 116, 131 (1966) (in action for injunction against state legislature and individual legislators, Court has jurisdiction to review legislature's power to exclude a prospective member).[47]

c. Finally, the City Council, by approving the Consent Decree, voluntarily assumed the obligation to abide by the general terms of the Long Term Plan and to enact the legislation necessary to implement the Plan.[48] Thus, the City's own govern-

---

accordance with the requirements of the Constitution and the statute. See, *e.g.*, *United States* v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) (three-judge court); *Clark* v. *Marengo County*, 623 F. Supp. 33 (S.D. Ala. 1985), aff'd, 811 F.2d 609 (11th Cir 1987); *Jordan* v. *City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

[47] Indeed, in holding that the common law immunity available to state legislators does not extend as far as the immunity enjoyed by federal legislators under the Speech or Debate Clause, this Court contrasted *Bond* v. *Floyd* with *Powell* v. *McCormack*, *supra*, which held that the Speech or Debate Clause barred a similar action against members of Congress. *Gillock*, 445 U.S. at 370 n.9.

[48] Petitioners' substantive challenges to the Consent Decree were not raised in the court of appeals and are therefore not preserved. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, those claims are meritless.

Petitioner Chema contends (Chema Br. 40-42) that the Consent Decree was not consensual. That assertion is wrong. See pp. 10-11, *supra*. The City was under threat of contempt in January 1988, *not* for its failure to enter into a consent decree but rather for its refusal to comply with the Housing Remedy Order, specifically its failure to submit a current HAP to HUD. Rather than undermining the validity of the Consent Decree, as petitioner Chema would suppose, the need for that threat of contempt simply highlights the longevity and extent of the City's contumacious behavior and the ultimate necessity for the sanctions at issue here. Moreover, the only action possibly spurred by the threat of contempt was the passage of the HAP. Before the parties agreed to the terms of the Consent Decree, a majority of the City Council had already agreed to vote to approve the HAP, thus removing potential contempt sanctions. And on January 25, 1988, when the parties informed the court that they had reached an agreement, the court stated that if there had been no agreement, it would have entered an order designating six public housing sites. The court did not state that it would have held the City in contempt if agreement had not been reached, or that it would have taken any action at that time with

ing body removed the question whether to enact the implementing legislation from the arena of discretionary legislative functions. The City Council did not cause the City to move to amend the Decree in order to delete or modify both the City's and the City Council's obligations under the Long Term Plan. Nor did it cause the City to appeal the denial of the City's motion to vacate the Decree.[49] Instead, the Council, with petitioners at the helm, simply refused to honor the commitment it had made just six months earlier.

This defiance may not be excused on the pretextual ground that the Consent Decree failed to spell out the terms of the legislation in detail. The terms of the Long Term Plan Order were substantially in accordance with the Consent Decree and were those proposed by the City during negotiations. When the City refused to negotiate the final details, the court was justified in entering the Long Term Plan Order and ordering the City to

---

respect to the Long Term Plan. Two days later, the City Council approved the Consent Decree.

Petitioner Spallone contends (Spallone Br. 40) that "the integrity of the consent decree and the propriety of the proposed legislation" should be questioned. That claim is groundless. Spallone apparently bases his argument on the court of appeals' decision requiring the parties to seek an alternative to the Seminary property as a site for public housing. See *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 872-873 (2d Cir. 1988), cert. denied, 109 S. Ct. 1527 (1989). In that decision, however, the court of appeals upheld the removal of state court proceedings to federal court "to adequately protect the integrity of the Consent Decree" (858 F.2d at 865), and approved the City's condemnation of another site under that Decree (*id.* at 865-868, 873). The court of appeals did not question the integrity of the Consent Decree and did not even address the propriety of the proposed legislation at issue here. Far from undermining the validity of the Consent Decree, the court of appeals commended "[t]he patience exhibited by the district court under enormously trying circumstances" and urged the implementation of the Housing Remedy Order "as quickly, and hopefully as smoothly, as possible" (*id.* at 872, 873). In fact, on remand from *Yonkers Racing Corp.*, the district court designated a substitute site for the Seminary property. See J.A. 615-619. The court of appeals recently has affirmed that ruling. See *United States* v. *Yonkers Bd. of Educ.*, No. 89-6050 (2d Cir. Apr. 17, 1989).

[49] Petitioners here represent a voting majority of the Yonkers City Council. For discussion of the Council's powers, see note 44, *supra*.

enact legislation in accordance with it. See Pet. App. 21a-22a. In any event, the Council never enacted any legislation at all, as it had promised to do in the Consent Decree, and none of the petitioners suggested any substantive changes in the Long Term Plan Order or the Affordable Housing Ordinance to the district court.

As summarized by the court of appeals (Pet. App. 27a), "[n]o litigant, least of all public officials sworn to uphold the Constitution of the United States, may be permitted to avoid compliance with solemn commitments they have made in a consent judgment entered by a federal district court to remedy constitutional violations." Petitioners thus should not be afforded a safe harbor in the immunity recognized by *Consumers Union* in very different circumstances.

C. The First Amendment Does Not Shield Individual Members Of The Yonkers City Council From Sanctions For Obstructing The City Of Yonkers' Compliance With Valid Court Orders

Petitioner Chema alone contends (Br. 33-38) that the district court violated his First Amendment right to free speech by subjecting him to contempt sanctions for his obstruction of the City's compliance with the court's orders, and particularly for his refusal to vote for the implementing legislation required by the Consent Decree. This novel argument is without merit. No decision of this Court examining the individual rights of federal or state legislators has considered as protected speech a legislator's act of voting in his official capacity. Rather, the Court has looked to other common law and constitutional principles in resolving individual legislators' challenges to constraints on their activities. See, *e.g.*, *Lake Country Estates*, 440 U.S. at 402-405 (doctrine of legislative immunity); *Gravel* v. *United States*, 408 U.S. 606 (1972) (Speech or Debate Clause); *Tenney* v. *Brandhove*, 341 U.S. 367 (Speech or Debate Clause and doctrine of legislative immunity); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) (separation of powers principle).

As the Court's analysis in these cases reflects, common law legislative immunity, together with applicable constitutional

provisions and principles, such as the Speech or Debate Clause and separation of powers, offer legislators the necessary and appropriate protections from undue interference with their legitimate legislative activities. See, *e.g.*, *Tenney*, 341 U.S. at 372; *Lake Country Estates*, 440 U.S. at 403. Accordingly, whatever protections petitioners would have under the First Amendment for actions or failure to act in their official capacity should be no broader than those derived from the doctrine of legislative immunity. To contend that the act of legislative voting enjoys greater First Amendment protection than this would suggest that the resulting legislative enactments would similarly be protected by the First Amendment from statutory and constitutional constraint—an obviously untenable proposition.

To the extent that the First Amendment applies at all to a legislator's act of voting in his official capacity,[50] petitioner

---

[50] Only two federal court decisions have been found suggesting that the First Amendment has any application to a legislator's act of voting. In *Wrzeski* v. *City of Madison*, 558 F. Supp. 664 (W.D. Wis. 1983), the district court granted a preliminary injunction against enforcement of a city council ordinance requiring each member to vote "aye" or "no" on every resolution (or face censure or fines). In concluding that the plaintiff council member had "a reasonable likelihood of success on the merits of her free speech claim," the court emphasized that under the council's procedures, a vote of "no" was functionally indistinguishable from an abstention, and thus no discernible purpose was served by requiring a "no" vote instead of an abstention (*id.* at 668-669). We do not agree with the *Wrzeski* rationale, but in any event the present case is clearly different: here, a "no" vote by a Council member constitutes official defiance of a federal court order based on the Council's own consent to the entry of a decree. Thus the purpose of subjecting a "no" vote to the sanction of contempt in this case is manifest.

In *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), appeal pending, No. 88-5439 (D.C. Cir.) (argued Apr. 20, 1989), the district court held that the "Armstrong Amendment" (Tit. I, § 145 of the District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269), which conditioned the appropriation of funds to the District of Columbia on the District of Columbia City Council's modification of one of its laws, placed "an unjustified burden on the first amendment rights" of the City Council members (705 F. Supp. at 613). We disagree strongly with this opinion, and have challenged that judgment on appeal on a number of grounds. But the case, once again, is very different; indeed, the district court in *Clarke* itself distinguished the

Chema cannot claim such protection here.[51] The Council members, including Chema, were free to express their views on the merits of the Affordable Housing Ordinance both on and off the Council floor. Compliance with the court's orders, however, required them to *act* by adopting that Ordinance. That their official duty to perform this act necessitated the use of a word, or words, no more infringed the First Amendment than would a requirement that a public officer issue an order to a subordinate or execute a deed of conveyance. Council members, like other government employees required in their official capacities to express and implement policies they might not personally endorse, have no First Amendment right to refuse to carry out those duties:

> Perhaps the simplest example of a statement by a public employee that would not be protected by the First Amendment would be answering "No" to a request that the employee perform a lawful task within the scope of his duties. Although such a refusal is "speech," which implicates First Amendment interests, it is also insubordination, and as such it may serve as the basis for a lawful dismissal.

Connick v. *Myers*, 461 U.S. 138, 163 n.3 (1983) (Brennan, J., dissenting).

Here, the district court's orders required petitioners to perform a lawful task within the scope of their official duties. If they could not reconcile their obligations as city officials with

---

present case on the basis of the "compelling and public interest in obtaining compliance with federal court orders" (705 F. Supp. at 610), as well as the existence of "the Council's own prior agreement to a consent decree" (*id.* at 610 n.6).

[51] The inapplicability of the First Amendment to the situation at issue here—the imposition of civil contempt sanctions for Council members' obstructing the City's compliance with federal court orders—is perhaps best suggested by petitioner Chema's internally contradictory contentions that the district court's orders amount to both "compelled speech" (Chema Br. 35) and a "prior restraint" (Chema Br. 36), and by his syllogistic statement that "[h]is vote in the legislature was speech protected by the First Amendment because it was a voice vote" (Chema Br. 18).

their individual views and were unwilling to carry out that task, their recourse was to resign their offices. In a system of law, they were emphatically not at liberty to defy the law. As the court of appeals correctly concluded, "the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred" (Pet. App. 28a). Accordingly, the freedom of individual Council members under the First Amendment to express their views "does not permit them to take action in violation of law" (*ibid.*).

D. The District Court Properly Exercised Its Discretion To Bring About Compliance With Its Orders By Holding Individual Members Of The Yonkers City Council In Contempt Rather Than By Ordering Legislation In Effect Itself Or By Appointing A Commission To Do So

Petitioners (Spallone Br. 42-47; Chema Br. 20-24; Longo and Fagan Br. 20-21), joined by the City of Yonkers (City of Yonkers Br. 11-15), contend that the district court erred in imposing civil contempt sanctions against the Council members in order to require them to comply with its orders. In their view, the district court should have either enacted the legislation itself or appointed a commission to do so. Accordingly, petitioners and the City assert that either alternative would have been "less intrusive" than ordering the City to comply with the court's orders and subjecting the members of the Council to contempt. We disagree. Indeed, in our view, either alternative would have been a greater exercise of federal judicial power than the course actually taken.

1. The requirement that, in enforcing compliance with a lawful order, a court exercise " '[t]he least possible power adequate to the end proposed' " (*Shillitani* v. *United States*, 384 U.S. at 371 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230-231 (1821)), applies *not* to the choice between contempt and another remedy for the contemnor's disobedience, but rather to the choice between civil or criminal contempt, together with the

choice of particular sanctions. See *Shillitani,* 384 U.S. at 371 & n.9.[52] Thus, while alternatives to contempt may be available (see Fed. R. Civ. P. 70),[53] there is no authority for the proposition that the use of such alternatives is mandatory.[54]

---

[52] Indeed, the complete statement in *Anderson* v. *Dunn,* a case involving the imposition of sanctions for contempt of Congress, makes clear that the principle enunciated in *Shillitani* does not limit a court's power to choose contempt as a method of enforcement, but only governs the severity and duration of sanctions imposed for contempt:

> The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?
>
> Analogy, and the nature of the case, furnish the answer—"*the least possible power adequate to the end proposed*;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the *duration* of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

Anderson v. *Dunn,* 19 U.S. (6 Wheat.) at 230-231.

[53] Compare *Supervisors* v. *Rogers,* 74 U.S. (7 Wall.) 175 (1868) (approving appointment of a federal marshal to levy and collect taxes to satisfy a judgment, where state law specifically authorized such appointment as an alternative to contempt), with *Yost* v. *Dallas County,* 236 U.S. 50, 57 (1915) (disapproving lower court's effort to levy tax, where state law did not so authorize).

[54] In *United States* v. *Paradise,* 480 U.S. 149, 174-177 (1987), the plurality opinion concluded that the lower court's determination to impose race conscious relief was "plainly justified," and rejected a suggestion, which had not been made to the district court, that fines should have been imposed instead. The plurality opinion did not rule that the imposition of fines would have been improper, but rather that it would not have been sufficient under the circumstances of that case. *Ibid.*

Similarly, this Court has authorized federal courts to impose remedial electoral reapportionment plans on state and local jurisdictions "pending later legislative action" where local officials have failed to act or an election is imminent. *Wise* v. *Lipscomb,* 437 U.S. 535 (1978); see also *Reynolds* v. *Sims,* 377

In any event, either the court's own enactment of the legislation, or its appointment of a Commission to carry out the City Council's responsibilities under the Decree, would have been a greater, not a lesser, exercise of judicial power. See J.A. 519 (Marshall, J. dissenting from grant of stay) ("Surely it is both less disruptive and more effective to order compliance * * * than to usurp completely the Council's legislative authority and enact the legislation directly."). Indeed, as the district court itself said: "[T]his court is not eager to assume any greater role than the circumstances require, not out of a lack of interest, concern or power but rather a concept of what the proper role of a federal court is in a circumstance such as this" (J.A. 357). A federal court's direct assumption of local legislative power, free from the inevitable constraints involved in acting through existing legislative bodies, raises more serious questions of federalism and comity than the course adopted here.

2. In an action for contempt, a district court exercises discretion in determining which sanctions will best "bring[ ] about the result desired." *United States* v. *United Mine Workers*, 330 U.S. at 304; cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15. The court must "assess the effectiveness" of the proposed remedy "in light of the circumstances present and the options available in each instance." *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968). The district court, "having had the parties before it over a period of time, was in the best position to judge whether an alternative remedy * * * would have been effective." *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring). Here, the district court concluded, and the court of appeals agreed, that the imposition of contempt sanctions on both the City and petitioners was the best means of enforcing the

---

U.S. 533, 585-587 (1964). Such judicial action is deemed "provisional * * * so as not to usurp the primary responsibility for reapportionment which rests with the legislature." *Id.* at 586. However appropriate such enforcement mechanisms may be in the circumstances of those cases, they would not have been the best remedies for the City's defiance here. See pp. 44-47, *infra*.

court's orders and the "least possible power *adequate* to the end proposed" (Pet. App. 21a). On this record, that conclusion is unimpeachable.

a. The immediate end proposed was the City Council's enactment of the Affordable Housing Ordinance, an action essential to the implementation of the Long Term Plan and a step the City Council had expressly agreed to in the Consent Decree. Petitioners suggest (*e.g.*, Spallone Br. 46-47; Longo and Fagan Br. 27-28) that the court should have enforced this obligation by holding only the City in contempt. The district court, however, exercised its sound discretion in concluding that under all the circumstances in July and August 1988, such an order would not have been an effective remedy. Although the prospect of the imposition of contempt sanctions against the City alone had induced compliance in the past, by the summer of 1988, both the City and the City Council had made clear in advance that they would not "voluntarily adopt the legislation contemplated by the [court's orders]" (J.A. 351; see J.A. 345-346). Indeed, the City had stated that it was willing to return as much as $30 million in federal funds to avoid compliance. See pp. 11-12, *supra*. Since the Council was the only entity within the City that could bring about compliance, and since the City faced bankruptcy if the Council did not enact the Ordinance, coercive sanctions against the individuals personally and officially responsible for obstructing the City's compliance with the court's orders were justified.[55]

b. Moreover, enactment of the legislation by the court (or by a court-appointed Commission) would not have advanced the ultimate goal of implementing the Housing Remedy Order to alleviate the City's racially segregated public and subsidized housing. The district court recognized as much in January 1988,

---

[55] In retrospect, it appears that the sanction against the City was the principal factor in securing compliance. But it was far from clear that this would be so at the time the district court entered the July 26 Order and imposed contempt sanctions on petitioners. Moreover, the imposition of sanctions against petitioners—even though subject to a stay on the date the Ordinance was finally adopted—may also have played a significant part in achieving compliance.

when it ordered the City to pass the long overdue HAP (J.A. 175):

> There are limits and disadvantages to the practice of deeming things to have been done. One cannot deem housing to have been built. The building of housing is a complex matter which requires a multitude of proceedings and actions.

Simply ordering the legislation into effect would only have postponed the Council's next effort to obstruct the remedy, an eventuality that, in light of the Council's past conduct, the court recognized was likely (J.A. 357): "Obviously, if the city council were to say, well, Judge Sand, those are your orders, you do with them what you will but at some point we will reassert our authority, then we are engaged in an exercise which doesn't get housing built."

To avoid such future confrontations, the court proposed the creation of a Commission to take over the City Council's responsibilities entirely (J.A. 357-359). But the City, speaking expressly for the City Council, strenuously opposed creation of a Commission (J.A. 377-379), and none of the petitioners advocated that proposal until it appeared in their interest to do so—after the district court had imposed contempt sanctions and this matter reached the court of appeals. The Commission alternative thus promised only to create a new opportunity for City and Council defiance (see J.A. 407). The district court wisely chose not to follow that course.[56]

3. As the district court has recognized throughout this protracted and often bitter litigation, the prospects for the Housing

---

[56] Indeed, when it later became necessary to designate a substitute public housing site, the City even refused to acknowledge the court's authority to appoint a commission or to designate a site itself. See note 29, *supra*. Accordingly, despite the City's strenuous efforts to explain before this Court its "seemingly inconsistent positions with respect to the Affordable Housing Commission" (City of Yonkers Br. 14), the City apparently remains unwilling or perhaps unable to acknowledge its obligation to implement the district court's remedial orders. Indeed, the City is still incapable of taking a definitive position. See, *e.g.*, City of Yonkers Br. 15 ("The City's position now is that the Commission remains a possible solution to future problems.").

Remedy Order successfully to desegregate public and subsidized housing in Yonkers will improve greatly only if and when the Yonkers community finally accepts the legitimacy of that Order. But such acceptance will not come as long as the City and its officials continue to deny and defy the federal court's authority to enforce its remedial orders. Even with the Affordable Housing Ordinance now enacted, the implementation of the Long Term Plan will require many actions by City officials over the course of years. The cooperation of those officials will be essential to its success. As the United States stressed in support of its motion for contempt, the City and the City Council were deliberately avoiding responsibility for implementation of the housing remedy. Indeed, they were seeking to put the entire onus of implementation on the court (J.A. 360-362, 385-386, 393; see J.A. 349-353).

The United States argued in the district court that, in these circumstances, it was essential for the City to "take responsibility for its actions" (J.A. 361), and for the court "to take action to make sure that [its] orders [were] obeyed" (J.A. 393). The district court, upheld by a unanimous court of appeals, properly agreed with this assessment. Displaying the restraint that Article III courts must evince, the district court emphasized that federal courts should act only when there is "no responsible state or local authority that will act," and that the City must "recognize its obligation to conform to the laws of the land" by complying with the court's orders (J.A. 407). Thus, the district court's action is fully consistent with the solemn obligation of the federal judiciary to safeguard and vindicate the rule of law, including the higher law of the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
DAVID K. FLYNN
LINDA F. THOME
Attorneys

JUNE 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00302

Supreme Court, U.S.
FILED
JUL 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-856

In The

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

JAMES D. HARMON, JR.
Counsel of Record
BOWER & GARDNER
110 East 59th Street
New York, N. Y. 10022
(212) 751-2900

Attorneys for Petitioner

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT:

I. THE DISTRICT COURT ERRED IN NOT UTILIZING THE LEAST INTRUSIVE MEANS 3

II. THIS COURT'S PRECEDENTS AND PUBLIC POLICY SUPPORT THE APPLICATION OF ABSOLUTE LEGISLATIVE IMMUNITY 8

III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS 14

IV. THE DISTRICT COURT DID NOT HAVE AUTHORITY TO ENFORCE THE CONSENT DECREE AGAINST COUNCILMAN CHEMA ... 16

V. THE DISTRICT COURT'S JULY 26, 1988 ORDER IMPROPERLY MODIFIED THE CONSENT DECREE BY REMOVING FROM THE COUNCIL THE RIGHT TO CONSIDER THE ZONING CHANGES' IMPACT 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Amadeo v. Zant, 486 U.S. 214, 108 S. Ct. 1771 (1988) 2

Anderson v. Bessemer City, 470 U.S. 564 (1985) 2

Application of Sweeney, 1 Misc. 2d 125, 147 N.Y.S.2d 612 (Clinton Co. Sup. Ct. 1955) 18

Barr v. Matteo, 360 U.S. 564 (1959) 9

Connick v. Myers, 461 U.S. 138 (1983) 15

Cooke v. United States, 267 U.S. 517 (1925) 5

Cooper v. Aaron, 358 U.S. 18 (1958) 12

Delaware Valley Citizens v. Commonwealth of Pa., 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982) 18

Dombrowski v. Eastland, 387 U.S. 82 (1967) 10

Gravel v. United States, 408 U.S. 606 (1972) 9, 13

Griffin v. Co. School Bd., 377 U.S. 218 (1964) 13

Haller v. Carlson, 42 A.D. 2d 829, 346 N.Y.S.2d 108 (4th Dep't 1973) 18

Hanna v. Plumer, 380 U.S. 460 (1965) 18

Hills v. Gautreaux, 425 U.S. 284 (1976) 12

Kamhi v. Planning Bd. of Town of Yorkton, 59 N.Y.2d 386, 465 N.Y.S.2d 865, 452 N.E.2d 1193 (1983) 11

Kilbourn v. Thompson, 103 U.S. 168 (1881) 9, 11

Lake Country Estates v. Tahoe Planning Agency, 440 U.S. 391 (1979) 10, 11

TABLE OF AUTHORITIES – Continued

Page

Martin v. Wilks, ___ U.S. ___, 57 U.S.L.W. 4616 (June 12, 1989) 16

Meyer v. Grant, ___ U.S. ___, 108 S. Ct. 1886 (1988) .14, 16

Milliken v. Bradley, 418 U.S. 717 (1974) 12

Milliken v. Bradley, 433 U.S. 267 (1977) 7, 12

Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945) 18

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 17

Pickering v. Bd. of Education, 391 U.S. 563 (1968) 15

Regal Knitwear Co. v. National Labor Relations Bd., 324 U.S. 9 (1944) 18

Reynolds v. Sims, 377 U.S. 533 (1964) 6

Rizzo v. Goode, 423 U.S. 362 (1976) 7

Shillitani v. United States, 384 U.S. 364 (1966) 4

Spence v. Washington, 418 U.S. 405 (1974) 14

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 10, 11, 13

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 7, 13

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 15

Tenney v. Brandhove, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951) 9, 10, 12, 13

Texas v. Johnson, ___ U.S. ___, ___ U.S.L.W. ___, No. 88-155, slip op. (June 21, 1989) 14

TABLE OF AUTHORITIES – Continued

Page

United States Catholic Conference v. Abortion Rights Mobilization, Inc., ___ U.S. ___, 108 S. Ct. 2268 (1988) 5

United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988) 4

United States v. Fleischman, 339 U.S. 349, *reh'g denied*, 339 U.S. 991 (1950) 18

United States v. Paradise, 480 U.S. 149 (1987) 6

United States v. Thompson, 319 F.2d 665 (2d Cir. 1963) 5

United States v. United Mine Workers, 330 U.S. 258 (1947) 5

United States v. Yonkers Bd. of Education, 624 F. Supp. 1276 (S.D.N.Y. 1985) 2

Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) 17

Wise v. Lipscomb, 437 U.S. 535 (1978) 6, 7

Young v. United States, 481 U.S. 787, 107 S.Ct. 2124 (1987) 5

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. III 8

STATUTES, REGULATIONS AND RULES:

8 U.S.C. § 43 9

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1983 9

Fed. R. Civ. P. 23(e) 17

Fed. R. Civ. P. 52(a) 2

Fed. R. Civ. P. 65(d) 17, 18

Fed. R. Civ. P. 70 7

Charter of the City of Yonkers, Local Law No. 20-1961, Article III, § C3-1A 11

New York Pub. Off. L. § 2 18

OTHER AUTHORITIES:

T. May, *The Law, Privilege, Proceedings and Usage of Parliament* 47 (14th ed. 1946) 9

No. 88-856

In The

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

INTRODUCTION

This case of individual rights, immunities and liberties cannot be recast in the mold of collective guilt by Respondents' recounting of its lengthy procedural history.[1] The issue in the instant case is not the liability of

[1] Although recognized by the ACLU/NYCLU as significant, ACLU/NYCLU Brief, p. 23, the Government and NAACP ignore the particular position of Councilman Chema. Councilman Chema voted against the January 28, 1988 Consent Decree, as he did the Long Term Plan, June 28, 1988, and Affordable Housing Ordinance, August 1, 1988.

the City of Yonkers nor the appropriateness, generally, of the remedial measures ordered. Rather, it is whether Councilman Chema's legislative immunity and constitutional rights can be or need be subordinated to the goal of achieving desegregation.

The contempt sanction here challenged was imposed solely as the result of the July 26, 1988 order to vote, Appendix p. 446, not for disobedience of the Housing Remedy Order, the Long Term Plan Order, the Consent Decree, nor any other court orders, judgments or events which preceded it. Government Brief, pp. 19, 21, 23. The 400-page District Court opinion finding racial discrimination by the City does not state anywhere that Councilman Chema did anything unlawful or improper. *United States v. Yonkers Bd. of Education*, 624 F. Supp 1276 (S.D.N.Y. 1985). He was not even in office in 1986 when the District Court entered the Housing Remedy Order. In office only two weeks, Councilman Chema, on January 19, 1988, was faced with threats of contempt, restriction on his freedom to travel and removal from office by the District Court in an attempt to coerce the Consent Decree.[2] The record is clear and uncontroverted that Councilman Chema always

---

[2] That coercion was effective as to a majority of the members of the Yonkers City Council but Councilman Chema voted his conscience, and voted "no," on the resolution approving the Consent Decree.

The Government cannot now challenge the Court of Appeals' factual finding that Yonkers entered into the Consent Decree only after being threatened by the District Court with contempt sanctions. Fed. R. Civ. P. 52(a) prohibits an appellate court from setting aside a finding of fact "unless clearly erroneous," *Anderson v. Bessemer City*, 470 U.S. 564, 573, 580-81 (1985), "even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently." *Amadeo v. Zant*, 486 U.S. 214, 108 S. Ct. 1771, 1777 (1988), *quoting Anderson v. Bessemer City*, 470 U.S. at 574.

(Continued on following page)

showed respect towards the District Court in advocating a comprehensive, not piecemeal, solution to providing decent housing for those who had just voted him into office, and he said so publicly at council meetings:

> We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well.
>
> * * *
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution, which I believe is the supreme law of the land.

Appendix pp. 452, 507. The NAACP falsely accuses him of "years of resistance" and the "excesses of a mob," NAACP Brief, pp. 12, 14, with no factual basis in the record.

Councilman Chema asserts in this case before this Court his position that a constitutional end does not justify resort to unconstitutional means.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT UTILIZING THE LEAST INTRUSIVE MEANS.

Respondents appear to take issue with the correct statement of the law by the Court of Appeals that a court is obliged to use the " 'least possible power adequate to

---

(Continued from previous page)

The Court of Appeals' finding that Yonkers entered into the Consent Decree only after the District Court had threatened contempt sanctions is well-supported by the record, Appendix pp. 176, 182-83, and conceded by the NAACP: "[t]he district court clearly . . . threatened the City with contempt on several occasions before the City Council voted to adopt the Consent Decree," but justifies the court's threats on grounds that they "achieved their objective," NAACP Brief, p. 30. In other words, the ends justified the means.

the end proposed' " to effect its orders, including the selection of contempt sanctions, *United States v. City of Yonkers*, 856 F.2d 444, 454 (2d Cir. 1988), *citing Shillitani v. United States*, 384 U.S. 364, 371 (1966) [quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Yet they provide no precedent, nor any reasoning, which is persuasive.

Respondents make two fundamental errors in their analysis of the "least intrusive means" principle. First, they assume that the action was properly one for contempt (*see, e.g.*, Government Brief at 44), which begs the question of whether compelling Councilman Chema to vote for a specific local ordinance, on pain of contempt, was the appropriate remedial measure, which is precisely the issue raised in this case. Second, they assume that the goal was enactment of the Affordable Housing Ordinance (Government Brief at 45).[3]

Both assumptions are incorrect. First, the issue raised by Councilman Chema is whether an order to a legislator to vote "yes" on a pending bill, backed up by the contempt power, was the appropriate means to achieve the constitutional remedial goal. Second, that goal was desegregating housing in Yonkers, and the means to achieve that goal was to build public housing and subsidized affordable housing in predominantly white neighborhoods. The adoption of the Affordable Housing Ordinance was merely a subsidiary, probably no more than a tertiary, means to that goal. And the use of the contempt power was a means to that means. As such, Councilman Chema claims that the use of the contempt power was unnecessarily intrusive.[4]

---

[3] The Government waffles a bit, describing this as the "immediate end proposed," without stating what was, in its view, the ultimate goal of the remedy.

[4] Councilman Chema does not claim that he is free to disregard a lawful court order, but rather that the District Court's orders were unlawful because the court exceeded its

(Continued on following page)

The other fundamental error made by Respondents is mistaking the constitutional rights in conflict in *this* case. At issue on the one hand are the rights of minority group members to non-segregated housing; on the other hand are the First Amendment free speech rights of Councilman Chema and the legislative immunity of local legislators. The District Court, in exercising its undeniable *power* to enforce its orders, was required to be mindful of these rights of Councilman Chema, and to use means to "get housing built" which would not infringe those rights unless no other means were effective. We contend that a federal court must use, to borrow terms from strategic

---

(Continued from previous page)

power to issue them, a claim he clearly has the right to raise. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, ___ U.S. ___, 108 S. Ct. 2268 (1988) (one has a right to attack a civil contempt citation for refusal to obey a subpoena on the ground that the court lacked subject matter jurisdiction); *United States v. United Mine Workers*, 330 U.S. 258, 294-95 (1947); *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963) ("the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt"). Respondents never questioned this below. It was entirely appropriate for Councilman Chema, as "a matter of conscience," to test the validity of the July 26th order by submitting to the civil contempt sanction, especially where, as here, he raises an issue of the "excessive use of judicial power." *See United States Catholic Conference v. Abortion Rights Mobilization Inc.*, 108 S. Ct. at 2271. Moreover, this Court has supervisory power to regulate the exercise of the contempt power. *Young v. United States*, 481 U.S. 787, 107 S. Ct. 2124 (1987), *citing Cheff v. Schnackenberg*, 384 U.S. 373, 384 (1966); *see also Cooke v. United States*, 267 U.S. 517, 536 (1925), *citing Randall v. Brigham*, 7 Wall. 523, 540 (1869). We agree with the Government's stated position that " . . . the appellate process provides a safeguard against unlawful or unnecessary remedial requirements," Government Brief, p. 33, and this appeal is the ultimate step in that process.

military planning, a "graduated response," rather than "massive retaliation."

The Government makes an extremely important concession in this regard when it states, "In retrospect, it appears that the sanctions against the City was the principal factor in securing compliance." (Government Brief, n. 55). That is precisely the point; rather than using hindsight to regret "overkill," the District Court should have used foresight, and *first* use its power against the City, which was the party found liable, not against the constitutional rights of individuals who were neither parties nor liable. *See* Appendix, pp. 436-38. Speculation by the Government that any remedial measure other than contempt would have been ineffective, Government Brief at 46, is not a substitute for constitutional principles judiciously applied. We submit that the fundamental principle of our jurisprudence (tracing back, perhaps, to the biblical teaching of the story of Isaac and Jacob) is the use of measured and graduated sovereign power to achieve a legal goal by the least punitive method available.

The cases cited by the Government support, rather than negate, Councilman Chema's position. *United States v. Paradise*, 480 U.S. 149 (1987), shows that in most situations, direct action by the court is preferable to the use of penal or quasi-penal compulsion. *Wise v. Lipscomb*, 437 U.S. 535 (1978) stands for the proposition that courts can, in extreme cases, act when the legislature fails to act, not for a principle authorizing judges to direct legislators how to vote. This Court recognized in *Reynolds v. Sims*, 377 U.S. 533 (1964) that, while the primary responsibility may rest with the legislature, the appropriate remedy, if the legislature fails to act to correct violations of the Constitution, is for the court itself to act.

The principle that remedial measures should intrude as little as possible on the rights of others derives not only from the contempt cases cited by the Court of Appeals, but from other decisions by this Court and lower federal courts in which federal courts have been called upon to weigh competing constitutional rights of

disparate parties. Even when protecting the Fourteenth Amendment rights of one party, courts must safeguard the constitutional rights of the other parties and non-parties. To accomplish this, remedial measures are to be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). In *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), this Court wrote, "The principles of federalism which play such an important part in governing the relationship between federal courts and state governments [apply] where injunctive relief is sought against those in charge of an executive branch of an agency of state government." The same principles apply with even greater force to employing the contempt power to compel a legislative body or its members to perform a legislative function, or to compel speech by any person.

The Fifth, Eighth and Ninth Circuits, and even the Second Circuit in this case, 856 F.2d at 454, have applied this principle in cases involving violations of constitutional rights and remedies for those violations. Brief for Councilman Chema, pp. 20-21. Respondents simply ignore the teaching of these cases, which recognize two important constitutional principles: avoidance, when possible, of confrontation between federal judicial power and the rights of state and local governmental units (indeed, *Wise v. Lipscomb, supra*, cited by the Government, supports this principle) and the goal of avoiding or minimizing conflict between competing constitutional rights or privileges.

In this case, the District Court had alternatives that would not infringe Councilman Chema's rights. For example, the District Court could have appointed a "fair housing commission" with properly circumscribed powers to carry out the long-term housing order pursuant to Fed. R. Civ. P. 70, to achieve the end of building

affordable, desegregated housing.[5] Instead, the court took the *most* constitutionally intrusive course of action by ordering Councilman Chema how to vote, thereby unnecessarily depriving him of his First Amendment rights and his rights as an elected legislator, thus setting the stage for an unnecessary constitutional confrontation.

Rather, the District Court was required to use those means at its disposal to achieve the remedial goal of the affordable housing plan which were far less intrusive upon Councilman Chema's individual rights than a coerced vote backed up by the contempt power.

II. THIS COURT'S PRECEDENTS AND PUBLIC POLICY SUPPORT THE APPLICATION OF ABSOLUTE LEGISLATIVE IMMUNITY.

In arguing against the applicability of legislative immunity to Councilman Chema, the Government and the NAACP both overread, misread and misapply this Court's and other courts' precedents. They ignore the roots of the immunity doctrine which may be traced back to the parliamentary struggles of 16th and 17th century England. They wrongly assume the lawfulness of the District Court's July 26 and August 2, 1988 orders, both of which violate Article III, principles of federalism, comity and separation of powers, and exceed the constitutional limitations on equitable remedial powers articulated

---

[5] Councilman Chema does not contend that the District Court had the power to enact the Ordinance itself, Government Brief, p. 42; ACLU/NYCLU Brief, p. 37, but that the court could have superseded Yonkers' existing zoning laws by allowing the housing to be built *as if* Yonkers' law permitted its construction, or by preempting Yonkers' law. The judicial power of the courts of the United States does not include the power to enact any statute, law or ordinance. Court enactment of the Affordable Housing Ordinance was not a valid alternative for the District Court.

by this Court. Finally, both speciously argue that considerations of public policy do not support immunity in this case. This Court's precedents, public policy considerations and history of the immunity doctrine, together with the virtues of federalism, comity and separation of powers, support legislative immunity for Councilman Chema.

At the outset, the Government's and NAACP's attempts to argue the inapplicability of legislative immunity by noting that *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951), and subsequent cases, including several decisions by the various Courts of Appeals, involved private actions under 42 U.S.C. § 1983, Government Brief, pp. 28-30; NAACP Brief, p. 22, are not persuasive. First, before and after *Tenney*, this Court has applied the principle of legislative immunity in cases not arising under Section 1983. *See, e.g., Gravel v. United States*, 408 U.S. 606 (1972); *Kilbourn v. Thompson*, 103 U.S. 168 (1881). Although the watershed case of *Tenney* involved a private damage action brought under 8 U.S.C. § 43, the predecessor statute to 42 U.S.C. § 1983, the rationale and reach of the Court's broad analysis was not in any manner confined by that circumstance.

Tenney supports the application of legislative immunity in this case. Both the Government and the NAACP fail to recognize that legislative immunity long antedates *Tenney*.[6] Indeed, the *Tenney* Court traced the roots of "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" to the English parliamentary struggles, in

---

[6] In *Barr v. Matteo*, 360 U.S. 564, 579 (1959), the Court recognized that "absolute legislative privilege dates back to at least 1399." Historically, the privilege was "essential to *every* free council or legislature." T. May, *The Law, Privilege, Proceedings and Usage of Parliament*, 47 (14th ed. 1946) (emphasis added).

which the doctrine of legislative immunity arose to protect members of Parliament from coercion by the executive. *Tenney*, 341 U.S. at 372.

Public policy considerations strongly support legislative immunity. As demonstrated in Councilman Chema's main brief, legislative freedom is of vital importance in preserving the integrity of the legislative process, insuring legislative independence, thereby protecting the public good. *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 405 (1979).[7] As a local legislator, Councilman Chema is closer to his constituents than federal, state or regional legislators, acts on vital matters of local importance and is more vulnerable to litigation and its deterrent effects to the uninhibited discharge of his legislative duties. Councilman Chema "should be protected not only from the consequences of litigation's results but also from the burden of defending" himself. *Dombrowski v. Eastland*, 387 U.S. 82, 84 (1967). *See also Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 729, 734 (1980) (Virginia Supreme Court and its members, despite "their continued failure and . . . refusal to amend" the state bar code to conform with constitutional requirements set by this Court, were legislatively immune from declaratory and injunctive relief on such public policy grounds).

Legislative immunity, rooted in principles of federalism, comity and separation of powers, as well as history, also serves the salutary purpose of guarding against

---

[7] The claims of the Government and NAACP that the District Court's orders did not interfere with Councilman Chema's legislative independence because his "discretion to act" or "independence of action" was already circumscribed by the court's orders, Government Brief, p. 32; NAACP Brief, p. 22, merely restate the issue. It is our fixed position that the District Court acted beyond its authority precisely because it senselessly interfered with Councilman Chema's independence and discretion.

undue federal interference with state legislative functions. *See Consumers Union*, 446 U.S. at 731-733. In ordering Councilman Chema to vote and how to vote, or face fine and imprisonment if he were to vote otherwise according to the dictates of his conscience and constituency, the District Court directly interfered with the most fundamental legislative functions, voting and zoning, and thereby violated our very system of representative government.[8] In ruling that Councilman Chema was absolutely and legislatively immune, this Court would reestablish the proper balance between the exercise of Article III power and the interests of democracy served by the independence of local legislators.[9]

---

[8] To the extent that the Government and NAACP assert that Councilman Chema's vote was ministerial, and not legislative, Government Brief, p. 32, n. 42; NAACP Brief, pp. 21, 23, they are plainly wrong. Under the Court's functional inquiry test for legislative immunity, casting a vote is within the "sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376; *Kilbourn*, 103 U.S. at 204. The power to enact a zoning ordinance is a state legislative function delegated to local legislative bodies by the New York State Legislature. *Kamhi v. Planning Bd. of Town of Yorkton*, 59 N.Y.2d 386, 389, 465 N.Y.S.2d 865, 866, 452 N.E.2d 1193, 1194 (1983).

Moreover, the Government's contention that legislative immunity should not apply to local legislators such as Councilman Chema because the Yonkers City Council exercises both legislative and executive powers is a red herring. Under the Court's functional inquiry test, particular functions, not particular offices, are relevant. Furthermore, the regional officials who were immune in *Lake Country Estates*, 440 U.S. at 394 (as acknowledged by Justice Blackmun in his dissent, 440 U.S. at 408), possessed both legislative and executive powers. Still further, the authority of the City Council "is legislative only." Charter of the City of Yonkers, Local Law No. 20-1961, Article III, § C3-1A.

[9] Contrary to the Government's contention that the Court of Appeals assumed that Councilman Chema was "entitled to

(Continued on following page)

Despite the many public policy considerations which support legislative immunity for Councilman Chema, the Government and NAACP claim that the "context of this case" dictate otherwise. Government Brief, pp. 29, 32-34; NAACP Brief, pp. 23-25. This amounts to no more than "transactional immunity," not absolute immunity, thus directly overruling *Tenney*. If legislative immunity depends on the willingness of legislators to "cooperate" with the federal judiciary, it is no immunity at all.

The Government, Government Brief, p. 33, concedes that the authority of federal courts to redress constitutional violations is subject to limitations arising from the Constitution. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*); *Hills v. Gautreaux*, 425 U.S. 284 (1976). Indeed, as recognized by the ACLU/NYCLU in their *amicus* brief, ACLU/NYCLU Brief, pp. 18, 23, there exist "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That power is not plenary." *Hills*, 425 U.S. at 293. Even when enforcing laudable guarantees of the Fourteenth Amendment, a district court must do so "in a manner that does not jeopardize the integrity of the structure or functions of state and local government." *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (*Milliken II*); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("No . . . judicial officer can war against the Constitution without violating his undertaking to support it"). Thus, "[t]he task is to correct, by a balancing of the *individual* and collective interests, the

---

(Continued from previous page)

the same immunity available to state legislators," Government Brief, pp. 29-30, n. 38, the Court of Appeals, far from "assuming" the applicability of legislative immunity to Councilman Chema, denied such immunity *in toto*.

condition that offends the Constitution." *Swann*, 402 U.S. at 15 (emphasis added).[10]

Legislative immunity not only precludes the District Court's compelled legislative vote and the imposition of civil contempt sanctions against Councilman Chema, but also serves to restore the delicate balance of our revered form of representative government, further comity and preserve our federalism.

---

[10] The pre-*Tenney* cases cited by the Government to deny legislative immunity to Councilman Chema, where federal courts issued writs of mandamus to compel local legislatures to satisfy federal court judgments entered after such local governments defaulted in their obligations to bondholders and where local legislators were held in contempt for refusing to comply with *valid* federal court orders, most of them occurring before the turn of the century, are inapposite. Government Brief, pp. 30-31. In none of those cases was the issue of legislative immunity ever discussed.

The Government also notes that this Court " 'has generally been quite sparing in its recognition of claims to absolute official immunity,' " Government Brief, p. 27, *citing Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988), but fails to realize this Court's acknowledgement in *Gravel v. United States*, 408 U.S. 606, 624 (1972) that "[p]rior cases have read the Speech or Debate Clause *'broadly* to effectuate its purposes' . . . and have included within its reach anything 'generally done in a session of the House by one of its members in relation to the business before it (emphasis added).' " Common-law immunity, "similar in origin and rationale" to the Speech or Debate Clause immunity, *Consumers Union*, 446 U.S. at 732, should likewise be read broadly in the instant case to effectuate its purposes.

Further, as explained in our main brief, *Griffin v. Co. School Bd.*, 377 U.S. 218 (1964) is of no help to the Government and NAACP. The portion of the *Griffin* opinion relied upon by the Court of Appeals is pure dictum. The Court cited no support for, nor engaged in any discussion of, this controversial proposition. The question of legislative immunity was also never discussed because the issue was not before the Court.

III. THE JULY 26, 1988 ORDER AND THE CONTEMPT JUDGMENT VIOLATED COUNCILMAN CHEMA'S FIRST AMENDMENT RIGHTS.

The ACLU and NYCLU in their *amicus* brief agree that Councilman Chema's legislative vote was a political statement protected by the First Amendment. ACLU/NYCLU Brief, pp. 12-13, 20-21. This certainly is not surprising since Councilman Chema's oral vote was both actual speech and symbolic speech as it expressed a particularized message that was likely to be understood by those who heard it. *See Texas v. Johnson*, ___ U.S. ___, ___ U.S.L.W. ___, No. 88-155, slip op. (June 21, 1989); *Spence v. Washington*, 418 U.S. 405 (1974).

A vote is speech protected by the First Amendment not because it involves an incidental spoken word, Government Brief, pp. 21, 41, but because it is the fundamental act of democracy. It is not merely a ministerial act such as issuing an order to a subordinate or executing a deed of conveyance, *Id.* at 41. Councilman Chema's vote was "core political speech" – the most highly protected form of speech – because it concerned political change. *See Meyer v. Grant*, ___ U.S. ___, 108 S. Ct. 1886, 1891-92 (1988).

The Government and the NAACP actually argue that legislators have fewer First Amendment rights than ordinary citizens and that they do not have the right to vote freely in the legislature to which they were duly elected. Government Brief, p. 39, NAACP Brief, pp. 27-29. The reason advanced for this astonishing proposition is that, in the cases heretofore decided by this Court involving attempts to constrain the speech of legislators, the Court relied upon legislative immunity and the separation of powers principle to uphold the legislator's right to vote. Legislative immunity and the First Amendment serve complementary purposes. Legislative immunity protects the institutional integrity of the legislative process, while

the First Amendment guarantees personal rights. There is no basis in law or logic for the Government's contention that a legislator is stripped of his fundamental right of free speech when he engages in his legislative activities. *See Connick v. Myers*, 461 U.S. 138, 147 (1983) ("citizens are not deprived of fundamental rights by virtue of working for the government"); *Pickering v. Bd. of Education*, 391 U.S. 563 (1968).[11]

Legislators can fulfill their responsibilities to their constituents only if they can exercise their right of free speech by voting as their consciences dictate. For a federal court to dictate to a local legislator how he shall vote is, in effect, to remove the local legislator from office for the purpose of that vote, and to replace him with an unelected federal judge. This would deprive the legislator's constituents of their fundamental right to choose their own representatives. *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The Government's argument that Councilman Chema was not compelled to speak because he could have resigned his office, Government Brief, pp. 41-42; NAACP Brief, p. 28, is also constitutionally unacceptable. A person cannot be forced to purchase his constitutional rights at the cost of incurring a crushing penalty. *See Connick*, 461 U.S. at 156 (Brennan, J., dissenting) ("the government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment").

---

[11] The Government's contention that according First Amendment protection to a legislative vote would shield "resulting legislative enactments . . . from statutory and constitutional restraint," Government brief, p. 40, is sheer nonsense. A vote is protected whether or not legislation is enacted and, in the event of enactment, even if the vote was cast against enactment. The resulting legislation is always subject to challenge and judicial review.

The Government has not only failed to meet its almost "insurmountable" burden of supporting the District Court's restrictions on Councilman Chema's "core political speech," *Meyer v. Grant*, ___ U.S. at ___, 108 S. Ct. at 1894, but it now concedes that the less instrusive sanction against the City of Yonkers would have secured compliance, Government Brief, n. 55. Therefore, the District Court's restrictions on Councilman Chema's rights to speak and vote were unjustified.

IV. THE DISTRICT COURT DID NOT HAVE AUTHORITY TO ENFORCE THE CONSENT DECREE AGAINST COUNCILMAN CHEMA.

The District Court did not have power to enforce the Consent Decree against Councilman Chema because he was not a party to the Decree nor in privity with a party to it. *Martin v. Wilks*, ___ U.S. ___, 57 U.S.L.W. 4616, 4619 (June 12, 1989), *quoting Local Number 93, International Assoc. of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).[12]

Contrary to its argument in *Martin*, the Government now contends that the Consent Decree bound Councilman Chema even though he was neither a party nor a privy.[13] The Government relies almost entirely upon the

---

[12] This principle is so well-established that in *Martin* the Government wholeheartedly advocated it. The Government argued, "It is a fundamental principle of due process that a judgment may not be held binding on a litigant who was neither party nor privy to the litigation in which that judgment was entered." Brief for the Government at 9, filed in *Martin v. Wilks*, ___ U.S. ___, 57 U.S.L.W. 4616 (June 12, 1989).

[13] Respondents repeatedly argue that the collective assent of the Council was enough to give the Consent Decree legal force. Yet, the District Court's adoption of the Consent Decree displays yet another example of the insular exercise of its

(Continued on following page)

use of the term "officers" in Fed. R. Civ. P. 65(d) for its present contention. Government Brief, pp. 22-23; *see also* NAACP Brief, p. 17; ACLU/NYCLU Brief, p. 30. This reliance is misplaced. Elected legislators are not "officers" within the meaning of Rule 65(d). The purpose of Rule 65(d), which rule applies only to injunctions and restraining orders, not to judgments, is to prevent a party from

---

(Continued from previous page)

authority, because notice was not given to all class members before the District Court approved it. The Consent Decree was constitutionally infirm.

Rule 23(e) mandates that before any class action is settled, notice be given to all class members. Fed. R. Civ. P. 23(e). The notice provision of Rule 23(e) is "of constitutional significance and must be viewed in due process terms." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814 (1985). The notice must, therefore, " 'afford a reasonable time for those interested to make their appearance' " and file objections. *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) *quoting, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, the affected community was not given notice and a reasonable opportunity to be heard. Even the black community was not given a voice before the District Court. Appendix pp. 186, 201-202. On January 28, 1988, counsel for the NAACP argued (and the Government and the District Court accepted) that although there were "dissident voices" in the community, it was "premature to schedule that [fairness] hearing or to publish anything." Appendix pp. 211, 214. No notice was ever given, nor any hearing ever held with respect to the Consent Decree.

This highhandedness makes the District Court's deprivation of Councilman Chema's rights all the more significant. Since the District Court would not listen to the community directly, Councilman Chema's vote represented the only way in which his constituents' interests in decent housing could be voiced. Deprivation of fundamental individual rights should not turn on a decree of such dubious validity. Resort to the contempt power to enforce the Consent Decree was premature to say the least.

nullifying such orders by carrying out a prohibited act through someone under its control. *Regal Knitwear Co. v. National Labor Relations Bd.*, 324 U.S. 9, 14 (1944). Thus, all persons controlled by or in privity with a party – "officers, agents, servants, employees, and attorneys," and persons acting in concert – are bound under the rule to obey an injunction. It follows that a person is an "officer" of a party within the meaning of Rule 65(d) only if the party controls or is in privity with him.

In contrast to the subordinate persons covered by Rule 65(d), Councilman Chema is an elected representative answerable to only his constituents. Neither the Council nor the City can direct him how to vote. Councilman Chema is not a Rule 65(d) officer because of his separate and independent legal status vis-à-vis the City.[14]

No rule of procedure nor, indeed, any theory of inherent judicial authority to enforce judgments, can impair fundamental constitutional rights and historic immunities. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 445-46 (1945). Rule 65(d) does not alter the principle that legislators are not subject to injunctions for purely legislative acts, nor can it act to deprive any citizen of First Amendment rights.

In *Delaware Valley Citizens v. Commonwealth of Pa.*, 678 F.2d 470 (3d Cir.), *cert. denied*, 459 U.S. 969 (1982), the court did not hold that any individual legislator was bound by the consent decree to vote against the funding moratorium or to vote to repeal it, but instead held the

---

[14] Rule 65(d) "officers" are not the same as "local officers" under New York Pub. Off. L. § 2. "Officers" under Pub. Off. L. § 2 exercise some sovereign power and have discretion as to the mode of performing their duties. *Haller v. Carlson*, 42 A.D.2d 829, 346 N.Y.S.2d 108, 109 (4th Dep't 1973); *Application of Sweeney*, 1 Misc. 2d 125, 128, 147 N.Y.S.2d 612, 615 (Clinton Co. Sup. Ct. 1955). They are not the ministerial functionaries that Rule 65(d) contemplates.

Commonwealth of Pennsylvania in civil contempt, rejecting the state's contention that it could not be held responsible for actions of the legislature because the legislature was not a party. 678 F.2d at 472-76.

United States v. Fleischman, 339 U.S. 349, *reh'g denied*, 339 U.S. 991 (1950) does not support respondents' position that the collective vote of the Council may bind councilmen to the Consent Decree. Government Brief, p. 26. In *Fleischman*, the Court sustained the conviction of a member of the executive board of the Joint Anti-Fascist Refugee Committee for contempt of Congress in refusing to obey a Congressional subpoena, reasoning that as a holder of an office of joint responsibility, the defendant had an individual responsibility to authorize compliance with the subpoena. *Id.* at 355-57. The Court emphasized that its holding followed from the well-established rule that directors of corporations are responsible for taking appropriate action to comply with court orders directed at the corporation. *Id.* at 357-358. That case did not involve the First Amendment, legislative immunity, principles of federalism, separation of powers and judicial authority concerns present here.

V. THE DISTRICT COURT'S JULY 26, 1988 ORDER IMPROPERLY MODIFIED THE CONSENT DECREE BY REMOVING FROM THE COUNCIL THE RIGHT TO CONSIDER THE ZONING CHANGES' IMPACT.

The claim that the Ordinance was consistent with the Consent Decree because the Council retained authority to meet the zoning incentive needs of developers, NAACP Brief, p. 30, misses the point completely. The Consent Decree abolished the Council's discretion to consider the effect of zoning changes on the neighborhood, not because of any change in the Council's ability to approve

development incentives.[15] *Compare* Appendix p. 222 *with* Appendix pp. 549-56.

The Government's contention that the Ordinance was consistent with the Consent Decree because *some* entity retained authority to consider the impact of zoning changes, Government Brief, p. 25, also misses the point. The Ordinance fundamentally altered the Consent Decree because it shifted this authority from the Council to the Office of Implementation and the Planning Board.

CONCLUSION

For the reasons stated above and in the Brief for Petitioner, the judgment of the Court of Appeals for the Second Circuit should be reversed.

Dated: New York, New York
July 12, 1989

Respectfully submitted,
BOWER & GARDNER

Attorneys for Councilman Chema

By: JAMES D. HARMON, JR.
Attorney of Record
110 East 59th Street
New York, N. Y. 10022
(212) 751-2900

Of Counsel:
BARRY G. SARETSKY
MARTIN S. KAUFMAN
MICHAEL J. ENG
AARON F. FISHBEIN

---

[15] Councilman Chema had no opportunity to raise this claim in the District Court because he was not a party to the underlying suit. In the contempt proceeding, he was given inadequate time to prepare a defense, 856 F.2d at 452-53, and so was again unable to raise the issue. The claim was raised in oral argument before the Court of Appeals. Finally, the claim directly rebuts the arguments of the Government and the NAACP that the principle of legislative immunity has no application because the councilmen had no discretion to act. Government Brief, p. 32; NAACP Brief, p. 22.

(3) (6) (3)

Nos. 88-854, 88-856, 88-870

Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, et al.,

Petitioners,

—v.—

UNITED STATES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF SAVE YONKERS FEDERATION, INC. IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

HENRY MARK HOLZER
Counsel for Amicus Curiae
Old Wagon Road
Mt. Kisco, New York 10549
(914) 666-3799

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
The *Amicus Curiae*	1
ARGUMENT:	
Introduction	3
Question Presented	6
Disclaimers	6
Discussion	8
CONCLUSION	16

TABLE OF AUTHORITIES

Cases:	PAGE
Douglas v. City of Jeannette, 319 U.S. 157	9
Griffen v. County School Board, 377 U.S. 218	8
Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391	5 n.7
Lance v. Plummer, 384 U.S. 929	12
Milliken v. Bradley, 433 U.S. 267	8
Morrison v. Olson, ____ U.S. ____, 108 S.Ct. 2597	3 n.3
Shillitani v. U.S., 384 U.S. 364	7 n.11
Supreme Court of Virginia v. Consumers Union, 446 U.S. 719	14
Tenney v. Brandhove, 341 U.S. 367	9
U.S. v. Board of School Commissioners, 368 F. Supp. 1191	9 n.17
U.S. v. Gillock, 445 U.S. 360	15 n.18
Walton v. House of Representatives, 265 U.S. 487	9
Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658	9
Wood v. Georgia, 370 U.S. 375	5
Young v. U.S., ____ U.S. ____, 107 S.Ct. 2124	7 n.10
Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-854, 88-856, 88-870

HENRY G. SPALLONE, et al.,

Petitioners,

—v.—

UNITED STATES, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF SAVE YONKERS FEDERATION, INC. IN SUPPORT OF PETITIONERS

The *Amicus Curiae*

Save Yonkers Federation, Inc. ("SYF"), a not-for-profit corporation chartered under the laws of the State of New York, is an "umbrella" organization representing some forty civic, neighborhood and taxpayer groups in connection with all housing and related issues in the City of Yonkers.

Following the district court's finding that low-income public housing in the Southwest quadrant of the City of Yonkers had been racially segregated, and the court's remedial order requiring that 1,000 units of scattered site low- and "middle"-income

public housing be created outside of the Southwest, SYF (on behalf of its constituent organizations and their individual members) actively campaigned not against Judge Sand's liability finding, but against his remedy.

SYF's opposition included the filing of a Petition for a Writ of Prohibition in the United States Court of Appeals for the Second Circuit which contended that the district court's housing remedy order exceeded his statutory and general equitable powers, and that it violated the constitutional rights of Yonkers residents.[1]

SYF's opposition to the district court's housing remedy—which, instead of desegregating low-income public housing in Southwest Yonkers, seeks to integrate the rest of Yonkers with 1,000 scattered site units of low- and "middle"-income housing—continues with this brief *amicus curiae* supporting the Yonkers City Councilmen who were forced to enact remedy-implementing legislation under threat of personal fines and imprisonment.

---

1 The Petition for a Writ of Prohibition was denied, as were requests for rehearing and en banc consideration. A Petition for a Writ of Certiorari will be filed in this court by mid-May 1989.

ARGUMENT

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the [Yonkers City] Council members who fails to vote in favor of enactment of such legislation . . . shall be personally fined $500 per day . . . .

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988 any [Yonkers City] Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United States Marshall for imprisonment . . . .

Leonard B. Sand
United States District Judge[2]

* * *

That is what this suit is about. Power.

Antonin Scalia
Associate Justice,
Supreme Court of the United States[3]

Introduction

The facts of this case are set forth at length in the various submissions of the parties, and thus they will not be repeated here except as may be necessary to the discussion *infra*.

Basically, the broad contours of what happened below are not disputed.

---

2 Judge Sand's order of July 26, 1988 is Exhibit "A" (pages 1a-5a) to Petitioner Peter Chema's "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit" in case No. 88-856. That Appendix will be cited *infra* as "CA."

3 Scalia, J., dissenting in *Morrison* v. *Olson*, _____ U.S. _____, 108 S.Ct. 2597, 2623 (1988).

After a lengthy bench trial the District Court held that the City of Yonkers had racially discriminated in its placement of low-income public housing in the City's Southwest quadrant. Instead of desegregating the Southwest, Judge Sand ordered that housing in the rest of Yonkers be integrated by the creation of 1,000 scattered site units of low- and "middle"-income public housing. After the Second Circuit affirmed as to both liability and remedy, the City entered into a consent decree.[4] (In a related case, the Second Circuit acknowledged that the City's "consent" had been coerced: *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 865 (2 Cir. 1988)).

It turned out that in order to implement the consent decree the district court believed that the enactment of certain legislation was needed in Yonkers (e.g., changes in the zoning law). A majority of the seven-member City Council balked, and the district court began to escalate threats and penalties. In sum, the district court made it clear that unless the individual City Councilmen voted in the Yonkers City Council for the consent decree-implementing legislation, they would be fined and imprisoned—a level of coercion which Judge Sand himself characterized as "extraordinary": "I know," he admitted, "of no parallel for a court to say to [an] elected official, 'you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.' I find that extraordinary."[5] Extraordinary or not, eventually fines were levied and, with one foot figuratively inside the Metropolitan Correctional Center, two of the four recalcitrant City Councilmen (Longo and Fagan) capitulated.[6] The consent decree-implementing legislation was enacted.

---

4 Even though the consent decree purported to bar further proceedings, the City filed a Petition for a Writ of Certiorari. It was denied (108 S.Ct. 2821, June 13, 1988).

5 CA 29c.

6 Petitioners Chema and Spallone continued to vote against the consent decree-implementing legislation and the final Council vote was 5-2.

The Councilmen's Petitions for Certiorari were granted and their case is now before this Court. Understandably, Petitioners' focus in this Court appears to be on their immunity, *qua* municipal legislators, from contempt sanctions related to performance of their official duties.

However, the *amicus curiae* sees the matter differently, and believes that Petitioners have misconceived the real issue here.[7] As the *amicus curiae* will explain *infra*, implicit in, and at the core of, the immunity issue is the more fundamental question of the scope of the district court's contempt power vis-à-vis the legislative processes of a municipality. In other words, the *amicus curiae* focuses on the "cause" (i.e., the scope of the district court's power), not on the "effect" (i.e., the impact on the Councilmen).

Thus, although the *amicus curiae* supports the Councilmen's conclusion in this Court that they were immune from the district court's threats and contempt sanctions, we reach that conclusion by another route. We do not get there via the *holdings* of *Lake Country*, *supra*, and the other 42 U.S.C. § 1983 cases cited therein, because, among other reasons, this is not a 1983 case seeking civil damages but rather a contempt case where the prime actor is not a private plaintiff but a federal district judge. Instead, the *amicus curiae* reaches the conclusion that the Councilmen were immune because of the basic *principle* of legislative freedom underlying *Lake Country* and the cases cited therein, a principle which acts as a check on the contempt power of a federal district court, defining its power. As this court said in a related context nearly three decades ago: "In this situation the burden is on this Court to define the limitations upon the contempt power according to the terms of the Federal Constitution." (*Wood* v. *Georgia*, 370 U.S. 375 (1962)).

---

7 The Court, of course, possesses the power to address any issue "fairly comprised within the questions presented by the Petition for Certiorari. . . . (*Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

Question Presented

In light of Federalism and Separation of Powers principles, does the contempt power of a federal district judge extend to forcing elected municipal legislators, *qua* individuals, to pass laws in aid of implementing a remedy for constitutional violations?

Disclaimers

At the outset, in addition to its observation *supra*, concerning the proper focus for this Court in consideration of this case, the *amicus curiae* wishes to state what its argument here does *not* embrace.

First, we do not differentiate (as Justice Marshall did in his dissent from the grant of a stay [CA 10h-12h]) between a District Court's use of coercion/contempt to enforce such a "consent" decree as is found in this case, a more freely arrived-at consent decree, or a non-consent order or judgment. As we view the issue, the basic question is one of Federalism and/or Separation of Powers as a limitation on the scope of a district court's contempt power. *What* that power seeks to enforce or implement is irrelevant.

Second, unlike Petitioner Chema, the *amicus curiae* eschews the incremental argument that the district court's use of coercion-contempt to get municipal legislation enacted was "wrong" because "there exist[ed] less intrusive means for the district court to achieve its worthy goals" and because the force was used "as a first, rather than a last resort."[8] The *amicus curiae* argues that a federal district court lacks the power to do what was done here, no matter what other means did or did not exist, and that such power is absent first, last and always.

Third, the *amicus curiae* views as irrelevant for present purposes that the "wrong" in this case was of constitutional dimension, and that the "remedy" itself may have exceeded the district court's statutory and/or equitable powers.[9] The *amicus*

---

8 Petitioner Chema's Petition for a Writ of Certiorari, p. 8.

9 As to the remedy, as stated in footnote 1 above, SYF will presently file in this Court a Petition for a Writ of Certiorari.

curiae argues that no matter what the wrong or the remedy, a district court lacks the power to force elected municipal legislators to enact implementing laws.

Fourth, the *amicus curiae* does not, for present purposes, challenge the existence of a majority view on this Court that there exists "inherent judicial power to punish those violating court judgments with contempt. . . ."[10] Even if that is true, it too is irrelevant here because the mere existence of such power neither defines its scope nor allows it to overcome root principles of Federalism and Separation of Powers. Indeed, this Court recognizes that the contempt power has limitations.[11]

Fifth, the *amicus curiae* does not argue that any of the Petitioners should have been free of the district court's contempt power because the terms of the consent decree that two of them (and three other Council members) voted for were altered in the municipal ordinances that the court wanted enacted. For one thing, it is arguable whether or how much the consent decree was changed. For another, and more important, as we have said above, the basic question is the scope of the district court's contempt power, not what it was seeking to implement.

Sixth, unlike Petitioner Spallone, the *amicus curiae* does not agree that there existed an "obligation of the City of Yonkers to comply with the consent decree. . . ."[12] On the contrary, a principal reason that the *amicus curiae* has submitted this brief is because of its belief that a single principle unifies the district court's coercion of Petitioners to obtain the "consent" decree and his coercion of them to obtain the municipal legislation in aid of implementing that decree and his follow-up housing remedy order. As more fully discussed *infra*, that principle is that Federalism and Separation of Powers bar a district court from using the contempt sanction to achieve the enactment of legislation, *for any reason*.

---

10 Scalia, J., concurring in *Young* v. *U.S.*, ____ U.S. ____, 107 S.Ct. 2124 (1987).

11 *Shillitani* v. *U.S.*, 384 U.S. 364 (1966).

12 Petitioner Spallone's Petition for a Writ of Certiorari, p. 14.

Discussion

Much has already been said above, albeit of a conclusory nature, to the effect that Federalism and Separation of Powers prohibit the contempt power of a federal district court from being used to force elected municipal legislators, *qua* individuals, to enact laws in aid of implementing a remedy for constitutional violations.

Although the *amicus curiae* agrees with Justice Scalia's general observation in *Young*, *supra*, that "[e]xcept, however, for a line of cases beginning in 1895 with *In Re Debs* . . . whose holding and rationale we have since repudiated, no holding of this Court has ever found inherent judicial power to punish those violating court judgments with contempt . . . .",[13] there are other reasons as well why the legitimate scope of the district court's contempt power fell far short of where Judge Sand pushed it.

To begin with, the District Court was correct when he himself characterized as "extraordinary" his use of contempt power to force individual Yonkers City councilmen to enact specified legislation. Judge Sand wrote on a clean slate, and his inability to adduce either precedent or even policy to support his freewheeling use of federal judicial power is not surprising. Even accepting the language of 18 U.S.C. § 401(3) (which does not apply in this case), there is no statutory authority anywhere, let alone in the Fair Housing Act, which even impliedly authorizes a Federal judge to order individual legislators to enact laws. Nor has this Court ever found such authority to be "inherent."[14] Indeed, in his dissent from the grant of a stay in this case Justice Marshall acknowledged that even *Milliken* v. *Bradley*, 433 U.S. 267 (1977) and *Griffin* v. *County School Board*, 377 U.S. 218 (1964) do not so hold.[15] Moreover, since in the same place[16] Justice Marshall concedes that the immunity question which the

---

13 *Young*, *supra*, at _____ U.S. _____, 107 S.Ct. 2143.

14 See Justice Scalia's observations in *Young*, *supra*.

15 CA 11h.

16 CA 11h.

Councilmen have raised is an open one, it follows that the question of the scope of the district court's contempt power articulated by the *amicus curiae* here must be equally open, for the Councilmen could not be immune from the contempt power asserted by Judge Sand, at the same time that power continued to exist.

In addition, it should be noted that in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 695 (1979) Justice Stevens observed categorically, in a statement not challenged by the three justices who dissented in part, that "[w]hether [the State Department of] Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful."[17]

Doubtful indeed! The policy reasons, rooted in the principles of Federalism and Separation of Powers have consistently and often been enunciated by this Court.

In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943) and *Walton* v. *House of Representatives*, 265 U.S. 487 (1924) this Court stayed the hand of equity which might otherwise have interfered with the state governmental operations generally.

More specifically, this Court addressed "legislative freedom" eloquently and at length in *Tenney* v. *Brandhove*, 341 U.S. 367 (1951):

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. In 1523, Sir Thomas More could make only a tentative claim. Roper, Life of Sir Thomas More, in More's Utopia (Adams ed.) 10. In 1668, after a long bitter struggle, Parliament finally laid the

17 See also *U.S.* v. *Board of School Commissioners*, 368 F. Supp. 1191, 1227 (S.D. Ind.), aff'd 483 F.2d 1406 (7th Cir. 1975), cert. den. 421 U.S. 929 (1975), where the District Court acknowledged that it lacked the power to order a state legislature to pass laws.

ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament. Proceedings against Sir John Elliot, 3 How. St.Tr., 294, 332. In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' 1 Wm. & Mary, Sess. 2, c. II. See Stockdale v. Hansard, 9 Ad. & El. 1, 113-114 (1839).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: 'Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress * * *.' Article I, s 6, of the Constitution provides: '* * * for any Speech or Debate in either House, (the Senators and Representatives) shall not be questioned in any other Place.'

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.' II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv.

The provision in the United States Constitution was a reflection of political principles already firmly established in the States. Three State Constitutions adopted before the Federal Constitution specifically protected the privilege. The Maryland Declaration of Rights, Nov. 3, 1776, provided: 'That freedom of speech, and debates or proceedings in the Legislature, ought not to be impeached in any other court or judicature.' Art. VIII. The Massachusetts Constitution of 1780 provided 'The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court of place whatsoever.' Part I, Art. XXI. Chief Justice Parsons gave the following gloss to this provision in Coffin v. Coffin, 1808, 4 Mass. 1, 27:

These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.

• • •

> It is significant that legislative freedom was so carefully protected by the constitutional framers at a time when even Jefferson expressed fear of legislative excess. [Footnote omitted]. For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. 'The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.' Madison, The Federalist, No. XLVIII.
>
> As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability. Forty-one of the forty-eight States now have specific provisions in their Constitutions protecting the privilege. [Footnote omitted]
>
> • • •
>
> The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in Fletcher v. Peck, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in State of Arizona v. State of California, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154.

Consistent with the principles expressed in *Tenny* by Justice Frankfurter was Justice Black's prescient dissent from the denial of Certiorari in *Lance* v. *Plummer*, 384 U.S. 929 (1966):

> The significance of this case . . . is the manner in which the courts below exercised the power to punish for con-

tempt. . . . The question of the punishment here is even more important because it is imposed not after a full trial with all the constitutional Bill of Rights' guarantees but after a summary contempt proceeding in which a single judge lays down the law, prosecutes those whom he believes disobey it, passes judgment on the alleged violations, and finally imposes punishment as he sees fit. See Green v. United States, 356 U.S. 165, 198, 78 S.Ct. 632, 650-651, 2 L.Ed.2d 672 (dissenting opinion).

By ordering this state officer to surrender his badge and resign from his state office, the District Judge below assumed for the federal judiciary a new, unprecedented, and, I believe, highly dangerous power. To give federal judges such authority seems not only completely out of place in our federal form of government but it at least comes perilously close to violating the constitutional obligation of the Federal Government to guarantee to every State a republican form of government. Subjecting a state official's tenure of office to the discretion of the federal judiciary makes state officers responsible not to the people of the State but instead to federal judges who, according to the holding here, may oust them from their state office without even so much as a simple notice to the State whose officers they are. I cannot help but believe that the legislators who passed the 1964 Civil Rights Act will be greatly surprised if not shocked to learn that by passage of that law they empowered federal judges to remove state officers without even giving these impeached officers a trial by jury. * * * No reason is given by the courts below for not respecting the authority of a State to conduct its governmental operations by agents responsible to the people of the State. There is no suggestion that the traditional remedies for contempt are inadequate in this case. And no one claims that this new federal judge power to remove state officers is necessary to enforce the salutary provisions of the 1964 Civil Rights Act. It is clear that the judge's order here provides complete protection to the plaintiff's rights

without that part compelling the State's deputy sheriff to hold his job at the pleasure of the United States judges.

I regret that the Court refuses to review this case in order to make it clear to all the people just how far this new contempt power of federal judges goes. Here it is only an appointed deputy sheriff that is removed from office, but if this new contempt enforcement power is legal I can think of no reason why it cannot be used against more important state officials whether elected or appointed. If federal judges can remove sheriffs why not members of the state legislatures, state judges, and why not even state governors. In considering the importance of this power to remove state officers, it is highly relevant that this new power jeopardizes not merely officers in a few States, but threatens every state officer in every State from Florida to Alaska, from Maine to California and Hawaii. In order to protect the rights of citizens to vote in state elections this Court recently announced the constitutional principle of 'one person, one vote.' It seems a little early to graft onto that principle a new one giving United States judges the power to remove state officials chosen by the people in strict accordance with the 'one person, one vote' principle.

Mr. Justice HARLAN: This is one of those rare instances in which I feel justified in noting my dissent to the action of the Court on a petition for certiorari, not involving an adjudication on the merits. I fully share my Brother BLACK'S view that the issues in this case are important and that certiorari should be granted.

The *Tenney* principle of legislative freedom, rooted in the principals of federalism and separation of powers canvassed by Justice Black in *Lance*, formed the basis of this court's immunity ruling in *Lake County Estates*, *supra*, and later in *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980).

The latter case is extremely germane to the question presented here. Justice White's opinion for the unanimous court in *Consumers Union* (Justice Powell did not participate) not only

noted that in *Tenney* "[w]e have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressman under the Speech or Debate Clause" (446 U.S. at 732), but it went further.[18]

The court observed that

> . . . there is little doubt that if the Virginia legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, *or members* for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity. (446 U.S. at 733-4, emphasis added).

In other words, if a "wrong" existed (invalidity of the Code), legislators refusal to "remedy" (amend) it would be unreachable by civil process. If that is what this Court unanimously meant in *Consumers Union*, then the United States District Judge's use of his contempt power to force the Councilmen to enact legislation violated both Federalism and Separation of Powers. Federalism, because the Tenth Amendment reserves to the state all legislative power not delegated or prohibited, and thus the federal government lacks the constitutional authority to force the enactment of legislation by the states. Separation of powers because, with all respect to this Court, judges lack the textual, constitutional power to legislate.

At the risk of presuming, the *amicus curiae* cannot help but wonder what would be the reaction of those who so carefully

---

18 Since New York has a Speech or Debate Clause (Const., Art. III, § 11), to the extent that municipal councilmen enjoy derivative protection it can be said that Judge Sand's use of contempt violated petitioner's State Speech or Debate Clause Rights and thus also violated the principle of federalism. There are two "interrelated rationales", *U.S. v. Gillock*, 445 U.S. 360, 369 (1980), of the Speech and Debate Clause—445 U.S. 360, 369 (1980) avoiding judicial intrusion into the legislative branch, and protecting legislative independence—and both would seem to apply here.

erected the three pillars of American Constitutionalism—Federalism, Separation of Powers, and Judicial Review—were they to learn that under threat of fines and imprisonment a federal district judge forced elected municipal legislators to pass a law.

Conclusion

For the foregoing reasons the District Court lacked the power to force the legislation's enactment.

/s/ HENRY MARK HOLZER
Henry Mark Holzer
Counsel for *Amicus Curiae*

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION

(1) (10) (7)

Nos. 88-854, 88-856 and 88-870

MOTION FILED JUN 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HENRY G. SPALLONE, *Petitioner*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

PETER CHEMA, *Petitioner*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

NICHOLAS LONGO and EDWARD FAGAN, *Petitioners*,

—v.—

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*, *Respondents*.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Steven R. Shapiro
(*Counsel of Record*)
Christopher A. Hansen
John A. Powell
Helen Hershkoff
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

53pp

No. 88-854, 88-856 and 88-870

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

HENRY G. SPALLONE,
Petitioner,

-v.-

UNITED STATES OF AMERICA, et al.,
Respondents.

PETER CHEMA,
Petitioner,

-v.-

UNITED STATES OF AMERICA, et al.,
Respondents.

NICHOLAS LONGO and EDWARD FAGAN,
Petitioners,

-v.-

UNITED STATES OF AMERICA, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union (ACLU) and New York Civil Liberties Union

(NYCLU) hereby move for leave to file the attached brief amicus curiae, pursuant to Rule 36.3 of the Rules of this Court. The reason for the motion is that petitioner Spallone has refused to consent to the filing of this brief. Consents have been obtained from petitioners Chema, Fagan and Longo, as well as from respondents NAACP and the United States.*/

The ACLU is a nationwide, nonprofit, nonpartisan organization of over 250,000 members dedicated to defending the principles embodied in the Constitution. The NYCLU is one of its statewide affiliates. Both organizations have appeared before this Court on numerous occasions.

The issues in this case involve

---

*/ Copies of those consents have been lodged with the Clerk.

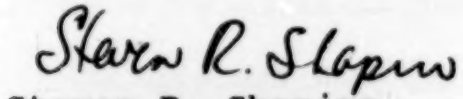
matters of longstanding concern to the ACLU. Throughout its 70 year existence, the ACLU has continuously looked to the federal courts as a forum for the vindication of constitutional rights. The vitality of that forum depends in large measure on the power of the courts to enforce their decrees. Any limitation on that power will necessarily affect the organizational work of the ACLU.

To avoid burdening the Court with repetitious argument, the ACLU has not addressed each of the issues raised by petitioners. Instead, we have focused our attention on the First Amendment claim set forth primarily by petitioner Chema. (Brief at 33-38).

We respectfully move, therefore, for leave to file the attached brief amicus

curiae in order to present the Court with our views in this important matter.

Respectfully submitted,



Steven R. Shapiro
(Counsel of Record)
Christopher A. Hansen
John A. Powell
Helen Hershkoff
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Arthur N. Eisenberg
New York Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Dated: June 8, 1989

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	19
PETITIONERS' INTEREST IN VOTING AGAINST AN AFFORDABLE HOUSING ORDINANCE, EVEN IF VIEWED IN FIRST AMENDMENT TERMS, IS OUTWEIGHED IN THIS CASE BY THE DISTRICT COURT'S INTEREST IN OBTAINING MEANINGFUL ENFORCEMENT OF ITS CONSTITUTIONAL ORDERS . . .	19
A. Petitioners' First Amendment Claim Is An Uncertain One . .	20
B. The Enforcement Of Federal Court Orders In Civil Rights Cases Is A Compelling State Interest	30
C. The District Court Remedy Was A Reasonable Choice Among Available Alternatives And Should Be Upheld	34
CONCLUSION	44

TABLE OF AUTHORITIES

Page

CASES

Bond v. Floyd,
385 U.S. 116 (1966) 24, 25, 26, 27

Brown v. Board of Education,
347 U.S. 483 (1954) 31, 33

Brown v. Board of Education,
349 U.S. 294 (1955) 33

Brown v. Louisiana,
383 U.S. 131 (1966) 21

City Council of Los Angeles
v. Taxpayers for Vincent,
466 U.S. 789 (1984) 38

Clarke v. United States,
705 F.Supp. 605 (D.D.C. 1988),
appeal pending,
No. 88-5439 (D.C.Cir.) 20

Cooper v. Aaron,
358 U.S. 1 (1958) 33

G.& C. Merriam v. Webster
Dictionary Co.,
639 F.2d 29 (1st Cir. 1980) 36

Griffin v. County School Board,
377 U.S. 218 (1964) 37

Hubbard v. Fleet Mfg.,
810 F.2d 778 (8th Cir. 1987) 36

Page

Marbury v. Madison,
5 U.S. 137 (1803) 32

Milliken v. Bradley,
433 U.S. 267 (1977) 36

N.A. Sales Co. v. Chapman,
736 F.2d 854 (2d Cir. 1984) 36

Pacific Gas & Elec. Co. v. Public
Utilities Commission of California,
475 U.S. 1 (1986) 27

Price Waterhouse v. Hopkins,
57 U.S.L.W. 4469 (May 1, 1989) 28

Sizzler Family Steak Houses
v. Western Sizzler Steak,
793 F.2d 1529 (11th Cir. 1986) 36

Spence v. Washington,
418 U.S. 405 (1974) 21

Stromberg v. California,
283 U.S. 359 (1931) 21

Swann v. Charlotte-
Mecklenburg Bd. of Ed.,
402 U.S. 1 (1971) 32, 36

Tashjian v. Republican Party
of Connecticut,
479 U.S. 208 (1986) 24

Tinker v. Des Moines
Independent School District,
393 U.S. 503 (1969) 21

Page

United States v. O'Brien,
391 U.S. 367 (1968) 31

United States v. Peters,
9 U.S. 115 (1809) 33

United States v. Swift & Co.,
286 U.S. 106 (1932) 29

West Virginia State Board
of Education v. Barnette,
319 U.S. 624 (1943) 27

Wooley v. Maynard,
430 U.S. 705 (1977) 27

STATUTES AND REGULATIONS

42 U.S.C. §1985 25

Fed.R.Civ.P., Rule 53 41

Fed.R.Civ.P., Rule 65(d) 30

Fed.R.Civ.P., Rule 70 41

OTHER AUTHORITIES

T. Emerson, The System of
Freedom of Expression (1970) 24

M. Yudof, When Government Speaks:
Politics, Law, and Government
Expression in America (1983) 24

INTEREST OF AMICI

The interest of amici is set forth in the motion attached to this brief.

STATEMENT OF THE CASE

This case has become an important symbol in the ongoing effort to eliminate the scourge of racial discrimination from American society. It was brought in the north, not the south. It was jointly litigated by the Department of Justice and local civil rights leaders. It resulted in the first judgment ever holding an American city guilty of both housing and school discrimination in the same lawsuit. And it has, unfortunately, led to a conflict between the district court and city officials that threatens the ability of district courts everywhere to enforce their constitutional decrees.

The contempt orders at issue on this appeal can only be understood in their historical context. The original complaint in this case was filed in 1980. In late 1985 -- following a ninety day trial -- the district court concluded that the City of Yonkers had violated the Fourteenth Amendment by deliberately placing nearly all of its public and subsidized housing in a largely black ghetto located in the City's southwest corner. See United States v. Yonkers Bd. of Education, 624 F.Supp. 1276, 1369-76 (S.D.N.Y. 1985).1/

One year later, the district court entered a Housing Remedy Order, which required the City to build public and subsidized housing outside of southwest

---

1/ In the same opinion, the district court also found that the City of Yonkers and its Board of Education had intentionally maintained a segregated school system. Id. at 1526-45.

Yonkers. See United States v. Yonkers Bd. of Education, 635 F.Supp. 1577 (S.D.N.Y. 1986), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 108 S.Ct. 2821 (1988). The City's response to that order was to engage in massive and persistent noncompliance. As fairly summarized by the district court:

> [T]he attitude of the representatives of Yonkers has been to do nothing affirmative, to place the entire onus of implementation on the Court, and to engage in obstructive and dilatory tactics. To date, there have been untoward delays in implementing the Housing Remedy Order some 18 months after its promulgation. Only the threat of bankrupting fines has produced any action by the City.

United States v. Yonkers Bd. of Education, 675 F.Supp. 1413, 1414 (S.D.N.Y. 1987).

In January 1988, the City finally signed a consent decree that set forth specific procedures for implementing its obligations under the Housing Remedy Order. (J.A.216-24). Of particular relevance

here, the City agreed to enact specific legislation within 90 days -- including zoning changes, tax abatements and density bonuses -- intended to encourage the construction of subsidized housing at designated sites chosen by the parties and approved by the court. (J.A.222). The City also agreed to work "diligently" with respondents in an effort to resolve any "subsidiary issues" no later than February 15, 1988. Id.

Those deadlines came and went, like so many earlier ones, without any action. Indeed, the only proposal by the City was an offer to return nearly $30 million in federal funds if the City were relieved of its duty to build public housing in white neighborhoods. 856 F.2d at 449. When the district court rejected that proposal, the City dug in its heels in two ways. First,

it refused to enact the legislation needed to develop subsidized housing, despite its agreement to do so in a consent decree. Second, it refused to continue negotiations on any plan for public housing, again despite its agreement to do so.

Faced with this recalcitrance, the district court issued a so-called Long Term Plan Order on June 13, 1988. Among other things, it contained the details of an Affordable Housing Ordinance that was based on a draft prepared by the City before it withdrew from negotiations. The district court then asked the City Council to fulfill its constitutional obligations by adopting the provisions of the Long Term Plan Order. The City Council responded by defeating a resolution that merely called on the City to obey its own consent decree and the remedial orders issued by the dis-

trict court. (J.A.345-46). On July 11, 1988, the City formally informed the district court that it would not comply with the consent decree and, through counsel, suggested that the court "enact" the necessary legislation itself.

Twice before the district court had adopted this approach and, through its conciliatory efforts, had obtained almost $20 million in federal housing funds for the City of Yonkers. (J.A.174).[2/] By the summer of 1988, however, it was clear that these released funds had not encouraged the City of Yonkers to produce the integrated housing required by the court's remedial order and the parties' consent decree.

Accordingly, on July 26, 1988, the district court entered an order directing

---

2/ See also Brief of Petitioner Chema (Ch.Br.) at 4.

the City Council to comply with the consent decree and enact the Affordable Housing Ordinance on its own by August 1st. In addition, the court tentatively scheduled a contempt hearing for August 2nd in the event that the specified legislation was not enacted. This order to show cause was served on both the City and the individual members of the City Council, all of whom are officers of the City under state law and thereby bound by each of the court's previous decrees.

On August 1, 1988, the City Council voted 4-3 against adopting the Affordable Housing Ordinance. The City and the four holdout votes on the City Council -- petitioners Spallone, Longo, Fagan and Chema -- were then held in contempt on August 2nd and 4th. In imposing a series

of escalating fines, the district court explained:

> [T]here does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

United States v. City of Yonkers, 856 F.2d 444, 451 (2d Cir. 1988)(quoting district court).[3/]

On August 26, 1988, the Second Circuit upheld the district court's contempt order

---

3/ Before entering its July 26th order, the district court had also considered the creation of an Affordable Housing Commission to function in lieu of the City Council on housing matters. The City opposed the idea at the time on the ground that it would divest the City Council of its "important legislative functions." (J.A.393).

and fines. Id.[4/] On September 1st, this Court stayed the sanctions against the Council members, but denied the City's motion for a stay. Spallone v. United States, 109 S.Ct. 14 (1988). On September 9, 1988, the City Council enacted the Affordable Housing Ordinance -- three years after the original liability finding, two years after the district court issued its Housing Remedy Order, eight months after a consent decree was signed, and five months after the deadline contained in the consent decree had come and gone.

This Court has now granted certiorari to consider whether the district court abused its discretion by holding four members of the Yonkers City Council in con-

---

4/ On appeal, the escalating fines against the City were capped at $1 million per day. 856 F.2d at 460.

tempt for their refusal to adopt an Affordable Housing Ordinance that was an integral part of an agreed-upon effort to remedy substantial and longstanding constitutional violations by the City of Yonkers. 109 S.Ct. 1337 (1989).[5/]

SUMMARY OF ARGUMENT

Nearly a decade after this litigation began, most of the issues have finally been resolved. Petitioners no longer challenge the district court's finding that the City of Yonkers deliberately segregated its public schools and housing for a period of forty years. They no longer challenge (in court) the plan to remedy those violations through school integration and scatter site

---

5/ The City's petition for certiorari was denied the same day without comment or dissent. City of Yonkers v. United States, 109 S.Ct. 1339 (1989).

housing. They no longer challenge the district court's authority to enforce its decrees. Indeed, at this stage of the proceedings they seem quite willing to accept the district court's authority to hold the City of Yonkers in contempt. Finally, petitioners do not seriously deny that the remedial efforts of the district court have been delayed and obstructed at nearly every turn by the resistance of Yonkers officials and, furthermore, that this resistance was most often centered in the City Council.

Petitioners nevertheless argue that the district court abused its discretion when it ordered the members of the City Council to enact implementing legislation that the Council had already accepted in principle by approving a consent decree in January 1988. Petitioners rest their objection on two basic grounds. First,

they contend that legislators have an inalienable right under the First Amendment to vote their own conscience, even if the effect of their vote is to renege on a prior agreement by the legislative body in which they serve, and to obstruct a court remedy designed to correct past constitutional wrongs.[6/] Second, petitioners claim that their actions in this case, no matter how contumacious, are cloaked by an absolute legislative immunity and thus cannot be subject to any judicial sanction. Amici believe that neither argument has merit. This brief, however, addresses only the First Amendment claim.

That claim is not entirely without substance. By definition, voting is a

---

6/ This argument is primarily raised by petitioner Chema. Ch.Br. at 33-38. It was also discussed by the Second Circuit in its decision below. 856 F.2d at 457.

political statement, whether done in the secrecy of the voting booth or the public glare of a legislative debate. We see no reason to doubt, for example, that all four of the petitioning councilmen sincerely disagreed with the district court when they voted not to adopt an Affordable Housing Ordinance. We cannot agree, therefore, that the First Amendment is irrelevant to this case.

At the same time, the vote of a legislator is more than a private act of conscience. It is also an official act with official consequences. Here, those consequences were both clear and intended. By voting against the Affordable Housing Ordinance, petitioners were hoping to block its implementation. They were also voting to impede vindication of plaintiffs' constitutional rights and to continue the

politics of racial polarization that have marred Yonkers' government at least since World War II. In effect, petitioners had placed themselves in the schoolhouse door and dared the district court to respond.

Confronted by this act of resistance, the district court had only three practical alternatives. It could blink first, and thereby allow a constitutional violator to dictate the scope of constitutional relief. It could disregard the recalcitrance of Yonkers' elected government by either acting in its stead or creating another body to do so. Or, it could use its equitable powers to insist that the government of Yonkers fulfill the constitutional responsibility it owes to each of its citizens.

The first option is obviously no option at all. As this Court has consistently recognized, the need to eradicate

officially sanctioned racial discrimination represents a state interest of the highest order. Here, that interest is heightened still further by the unprecedented finding of dual discrimination in both housing and education.

That leaves two options: either going around or through the Yonkers City Council. In choosing between these alternatives, we agree with petitioners that the existence of competing constitutional interests is relevant to the selection of an appropriate judicial remedy. We disagree, however, with petitioners' view that the district court's actions were incompatible with that general principle of judicial restraint.

Petitioners' intransigence had placed the district court in a position where any remedy it chose had obvious drawbacks. Creating an Affordable Housing Commission

to operate outside the normal channels of government, as petitioners now propose, is hardly a minor step. Indeed, the City strenuously objected when the possibility was even raised by the district court.

The district court's experience with adopting legislation for the City Council was scarcely more encouraging. Twice before the City Council had refused to ratify a "Housing Assistance Plan" required by the federal government as a condition of funding and the district court had acted in its stead. Although the district court's action had relieved the City Council of the political pressure it might have otherwise felt if federal funds were lost, it did not succeed in building any homes or in solving the underlying constitutional problem.

To be sure, the decision requiring the City Council to accept its constitutional responsibility by enacting an Affordable Housing Ordinance was strong judicial medicine. On the other hand, it had the unique benefit of forcing the City Council to play an active role in redressing the constitutional violations that its past actions had helped to create.

With the advantage of hindsight, petitioners argue that the same result could have been achieved by fining the City without fining the individual Council members. That may or may not be true. But hindsight cannot be the standard for judging the propriety of remedial relief in a constitutional case. The simple fact is that the district judge had lived with this case for almost ten years. He knew what he had tried and he knew what had not worked. His

decision is entitled to deference from this Court.

Obviously, the authority of district courts is not unlimited, even at the remedial stages of constitutional litigation. Under the circumstances of this case, however, it was entirely reasonable for the district court to conclude that the goal of integrated housing would never be achieved in Yonkers unless the City itself began to take some responsibility for its implementation. Likewise, it was reasonable for the district court to focus its attention on the City Council, which had created the roadblock to constitutional relief and which served as the center of local opposition.

Amici do not minimize the significance of the district court order. However, we are persuaded that its uniqueness is prima-

rily due to the unique circumstances of this case. Those circumstances will become less unique, and district courts less able to act as the guarantor of constitutional rights, if the order below is reversed.

ARGUMENT

PETITIONERS' INTEREST IN VOTING AGAINST AN AFFORDABLE HOUSING ORDINANCE, EVEN IF VIEWED IN FIRST AMENDMENT TERMS, IS OUTWEIGHED IN THIS CASE BY THE DISTRICT COURT'S INTEREST IN OBTAINING MEANINGFUL ENFORCEMENT OF ITS CONSTITUTIONAL ORDERS

This case can and should be decided on its facts. Given the history of official resistance revealed by this record, it is unnecessary to decide whether the act of legislative voting is <u>ever</u> protected by the First Amendment. It is sufficient to note that the judicial enforcement of constitutional decrees has always been recognized as a compelling governmental interest. On

a different set of facts, the balance might well be different.[7] This case, however, surely presents any First Amendment claim in its least sympathetic light.

A. Petitioners' First Amendment Claim Is An Uncertain One

It is impossible to quarrel with the proposition that petitioners' vote against the Affordable Housing Ordinance represented an expression of their political views. As such, it is entitled to some First Amendment protection, regardless of whether the process of casting a vote in a

---

[7] For example, a federal district court has recently held that Congress could not compel members of the D.C. City Council to vote for an amendment to their local anti-discrimination law on pain of losing federal funding. See Clarke v. United States, 705 F.Supp. 605 (D.D.C. 1988), appeal pending, No. 88-5439 (D.C.Cir.). Unlike the present case, Clarke does not present any clash between a legislator's First Amendment rights and a court's constitutional decree. Nevertheless, it highlights the variety of settings in which related claims may arise.

legislative chamber is characterized as speech or action. In either event, it seems undeniable that petitioners intended to "convey a particularized message" by their defiance of the district court order. Spence v. Washington, 418 U.S. 405, 411 (1974). Moreover, it seems equally clear that "in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." Id.[8/] Certainly, it came through loud and clear to the district judge.

At the same time, petitioners' effort to analogize the vote of a legislator to the vote of a private individual in the voting booth obscures important differences between the two situations. A private

---

8/ See also Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966); Stromberg v. California, 283 U.S. 359 (1931).

citizen votes to elect representatives. Once elected, those representatives are the government and their decisions when acting in that capacity have always been subject to constitutional scrutiny in a variety of ways.

This case perfectly illustrates the practical meaning of that distinction. Many residents of Yonkers were clearly upset by the terms of the consent decree. As private citizens, however, they had no capacity to block its implementation by refusing to enact the Affordable Housing Ordinance. Petitioners, by contrast, possessed that authority by virtue of their office and exercised it in this case to impede the vindication of important constitutional rights. Their refusal to adopt the Affordable Housing Ordinance was, therefore, more than an act of private

conscience. It was an official act with official consequences that petitioners fully understood and exploited.

Throughout their briefs, petitioners try to distinguish between their acts as individual legislators and the acts of the City Council as a corporate body. That distinction may have some relevance in considering the appropriateness of particular remedies. It has no relevance in determining the scope of petitioners' First Amendment interest. The City Council can only act through its individual members. Thus, when casting a vote against the Affordable Housing Ordinance, petitioners were clearly acting in their official capacities and as representatives of the Yonkers City government.

The question of whether and to what extent the First Amendment applies to offi-

cial "government speech" is one of the more vexing problems of modern First Amendment law. See generally, M. Yudof, When Government Speaks: Politics, Law, and Government Expression in America (1983); T. Emerson, The System of Freedom of Expression 697-716 (1970). It is essential, therefore, to be as precise as possible about the exact nature of any claimed abridgement.

Here, petitioners have plainly overstated their claim in an effort to fit within the contours of traditional First Amendment doctrine. In particular, petitioners' reliance on Bond v. Floyd, 385 U.S. 116 (1966), is clearly misplaced.9/

9/ Ch.Br. at 33-34. Petitioners also contend that the district court order directing them to vote for the Affordable Housing Ordinance violated the "protected relationship between a legislator and his constituents." Id. at 34. In support of that claim, petitioners cite Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), and a series of other political association cases. The (continued...)

The issue in Bond was whether the Georgia Legislature could exclude Julian Bond from assuming his legislative seat on the theory that his antiwar statements disqualified him from taking the oath of office. It was in that context that this Court wrote:

> [W]hile the State has an interest in requiring its legislators to swear to a belief in constitutional processes of government, surely the oath gives it no interest in limiting its legislators' capacity to discuss their views of local or national policy.

385 U.S. at 135-36 (footnote omitted).

9/ (...continued)
right to political association, however, does not include collective action designed to interfere with the exercise of someone else's constitutional rights. See, e.g., 42 U.S.C. §1985. Indeed, petitioners' argument would prevent the judiciary from ever declaring a law unconstitutional without considering the associational rights of its supporters. This Court has never embraced such a notion. Put in slightly different terms, petitioners are asserting a majoritarian right to overrule the constitutional decision of an Article III court. That proposition is irreconciliable with the doctrine of judicial review.

Nothing in Bond (or any other case that amici have found) sheds any light on whether legislative votes are protected by the First Amendment and, if so, how that right should be reconciled with the duty of the courts to enforce their constitutional decrees. Conversely, nothing in the challenged district court order limits petitioners' ability to discuss any subject they choose, including the controversy surrounding this lawsuit. To the contrary, petitioners can and have criticized the consent decree, the Affordable Housing Ordinance, and the district court's handling of this case to their hearts' content.

If Bond has any relevance to these proceedings, it is contained in this Court's acknowledgement that even legislators can be asked "to swear to a belief in

constitutional processes of government." 385 U.S. at 135. An oath of that sort obviously has First Amendment overtones. See Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). Nevertheless, Bond implicitly recognizes that legislators have no First Amendment right to impede constitutional government when acting in their official capacity.10/

Amici do not pretend that the First Amendment issues in this case are easy to

---

10/ In a somewhat analogous circumstance, employers found guilty of unfair labor practices by the NLRB are routinely required to post the agency's remedial order. From the employer's perspective, this could easily be construed as a requirement of compelled speech. Cf. Pacific Gas & Elec. Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986). Yet, such posting requirements are generally considered an appropriate means of safeguarding the important statutory rights the NLRB was created to protect. In this case, of course, we are dealing with constitutional rights and an Article III court.

unravel. This Court has recently grappled with the complications caused by a claim of mixed motive in discrimination cases. See Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (May 1, 1989). Here, the complication arises from the fact that petitioners' vote against the Affordable Housing Ordinance was both a statement of individual conscience and an act of official defiance to the vindication of constitutional rights.

Fortunately, the legal conundrum that might possibly exist on another set of facts largely disappears in the record of this case. First, there is the existence of a consent decree. By voting for that consent decree in January 1988, petitioners Fagan and Longo committed themselves to enacting some version of an Affordable Housing Ordinance. There is surely no impediment to holding them to the terms of

their own bargain. Cf. United States v. Swift & Co., 286 U.S. 106, 119 (1932)(proof of "grievous wrong" necessary to modify terms of a consent decree).

Unlike Fagan and Longo, petitioners Chema and Spallone voted against the consent decree and resist any notion that they are bound by its provisions. That proposition, however, is far from self-evident. As a general principle, it is surely reasonable to hold that the members of a democratic body are bound by the judgments of its majority. For example, no one would think for a moment that legislators were free to disobey a lawfully enacted statute on the ground that they did not vote for it. It is not intuitively obvious why consent decrees should be treated any differently. In fact, once signed by the court, a consent decree is governed by

traditional equitable rules that extend its effect to a party's officers and agents. E.g., Rule 65(d), Fed.R.Civ.P.

Beyond the issue of the consent decree, moreover, the district court's compelling interest in redressing a proven constitutional violation largely obviates the need to dissect the precise nature of petitioners' First Amendment rights. That important task can and should await another day.

B. The Enforcement Of Federal Court Orders In Civil Rights Cases Is A Compelling State Interest

It is impossible to read the record in this case without appreciating the practical obstacles faced by the district court in securing compliance with its constitutional judgments. The purpose of the order that petitioners now challenge was to achieve that goal. Even petitioners do not

seriously argue that it was designed to stifle criticism of the district court or its remedial approach.

Relying on that fact, the Second Circuit quickly dismissed petitioners' First Amendment claim with a citation to United States v. O'Brien, 391 U.S. 367 (1968).[11/] Often, of course, the choice of a standard determines the outcome. Here, that dispute is largely academic for the simple reason that the district court order is clearly supported by two state interests of the highest magnitude. The interest in undoing the effects of de jure segregation has been deemed compelling at least since Brown v. Board of Education, 347 U.S. 483 (1954). The interest in enforcing lawful court orders is inherent in the notion of judi-

---

11/ See 856 F.2d at 457.

cial review first set forth in Marbury v. Madison, 5 U.S. 137 (1803).

These interests often coalesce in civil rights cases when local resistance to judicial decrees is apt to be particularly strong.12/ Nor is that surprising. Judicial intervention is unnecessary where the political will exists to remedy prior discrimination. Where that political will is lacking, a declaration of rights means very little without injunctive relief. And injunctive relief is only as potent as the threat of enforcement that stands behind it.

As Chief Justice Marshall wrote almost two centuries ago:

12/ See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 14 (1971)("The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate school systems").

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

United States v. Peters, 9 U.S. 115, 136 (1809). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958).

One hundred and fifty years later, this Court made a similar point in ordering desegregation of the Topeka school system. After declaring in Brown I that "[s]eparate educational facilities are inherently unequal," 347 U.S. at 495, this Court held in Brown II, 349 U.S. 294, 300 (1955), that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." That statement of constitutional supremacy is equally pertinent in Yonkers today. We

therefore share the view of the district court, which summarized its predicament by stating: "I've said on many occasions that if federal civil rights remedial orders can be defeated by local political hostility we no longer live in a government of law." (J.A.394).

C. The District Court Remedy Was A Reasonable Choice Among Available Alternatives And Should Be Upheld

The heart of petitioners' argument is that the district court order requiring them to vote for the Affordable Housing Ordinance, and then fining them when they did not, was an abuse of discretion because it did not represent the least restrictive means available to the district court for enforcing its decree. The record in this case does not support that contention.

It is important to remember that the City Council had already agreed to enact an

Affordable Housing Ordinance when it approved the consent decree. In a very real sense, therefore, the remedy that petitioners now challenge was not chosen by the district court. Rather, the district court was merely enforcing a remedy that the City Council had chosen itself.13/

Furthermore, even assuming that the "least restrictive means" test applies in this context, none of the alternatives proposed by petitioners is clearly less drastic than the actual order issued by the district court. Under those circumstances, the decision of the district court is surely entitled to considerable deference. Any other approach would impose an ill-advised straitjacket on the ability of

---

13/ See pp.3-4, infra.

district courts to enforce their constitutional judgments.14/

As this Court has frequently held: "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. at 15. See also Milliken v. Bradley, 433

14/ The decision to fine petitioners for their willful noncompliance with the district court order can hardly be described as an abuse of discretion. Once civil contempt is established, a court's choice of coercive sanctions is rarely disturbed. See, e.g., Sizzler Family Steak Houses v. Western Sizzler Steak, 793 F.2d 1529, 1536 n.8 (11th Cir. 1986); N.A. Sales Co. v. Chapman, 736 F.2d 854, 857 (2d Cir. 1984); Hubbard v. Fleet Mfg., 810 F.2d 778, 782 (8th Cir. 1987); G.& C. Merriam v. Webster Dictionary Co., 639 F.2d 29 (1st Cir. 1980). In truth, of course, petitioners do not object to the form of the sanction but to any sanction at all. Assuming the validity of the underlying order, however, it is difficult to imagine a rule of law that requires the district court to ignore an act of willful contempt.

U.S. 267 (1977); Griffin v. County School Board, 377 U.S. 218 (1964).

The district court undoubtedly used that flexibility in this case. But it did so in an entirely reasonable manner. In particular, the district court recognized, as petitioners do not, that there were advantages and disadvantages to any way of dealing with petitioners' contumacious conduct.

Petitioners contend that the district court could have enacted an Affordable Housing Ordinance on its own without insisting on any further votes by the City Council. We agree as a matter of sheer judicial power. However, we also believe that the utility of any proposed remedy can only be judged in light of the goal it is

designed to achieve.[15/] In short, the end and the means are truly interrelated. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984).

Here, the objective of the district court was not to enact an Affordable Housing Ordinance for its own sake. The objective of the district court was to remedy the segregated housing patterns that the City of Yonkers had intentionally fostered for forty years. Given that long history of unconstitutional behavior, the district court can hardly be faulted for its conclusion that the chance of obtaining meaningful relief would be significantly enhanced with the City's cooperation. Perhaps more to the point, petitioners' unwillingness to

---

15/ As previously noted, the district court had followed the route that petitioners now propose on two prior occasions without notable success. See p.6, infra.

comply with the consent decree threatened to complicate every remedial step in what all parties understood would be a multiyear effort.[16] If nothing else, it encouraged an attitude throughout the City of Yonkers that desegregation could be delayed or avoided by engaging the district court in a war of attrition.

Petitioners also contend that the district court could and should have created an Affordable Housing Commission with power to adopt the Affordable Housing Ordinance and assure its implementation.[17]

---

[16] City officials charged with implementing the Affordable Housing Ordinance would have been left in an impossible quandary. Their employers would be ordering them to take one action. The court would be ordering them to take another. At the very least, this political gridlock could be expected to produce predictable delays if not outright obstructionism.

[17] It is fair to describe any remedy that supersedes the City Council as a "limited receivership."

Suffice it to say that petitioners' view of this plan as a less restrictive alternative was not shared by the City of Yonkers when it was originally suggested by the district court. (J.A.393).

The reasons are plain. The development of desegregated housing in Yonkers will require an enormous number of sensitive decisions over a long period of time. Some of those decisions, such as siting, are clearly related to the central issues of this lawsuit and thus an appropriate concern of the district court. It does not follow, however, that the district court has either the time or expertise to oversee numerous other decisions, including: Who should design the homes? Who should build them? And who should live in them? To place these decisions in the hands of a parallel bureaucracy operating under judi-

cial supervision may (or may not) be more efficient but it is hardly less intrusive. Certainly, the district court was entitled to consider the drain on its own resources before imposing a remedy in this case.[18/]

Finally, petitioners contend that the district court could have achieved the same results by holding the City in contempt without the necessity of also holding the Council members in contempt. Indeed, petitioners argue this is precisely what happened. The Affordable Housing Ordinance

---

18/ Once again, amici have no doubt that the district court possesses the authority to create an Affordable Housing Commission pursuant to Rule 70, Fed.R.Civ.P. But the existence of authority is not the same as using it. When the issue was discussed in the district court, all parties recognized that the appointment of an Affordable Housing Commision would be an extraordinary step. Petitioners now challenge that consensus by comparing the Commission to a special master. The appointment of special masters, however, is governed by an entirely different provision of the federal rules. See Rule 53, Fed.R.Civ.P.

was ultimately adopted when the mounting fines against the City became impossible to bear even though the individual fines against petitioners had been stayed by this Court.19/

The problem with this argument is that it only works with the benefit of hindsight. At the time the contempt orders were issued, the district court had no way of knowing when or if the council members would bow to the pressure created by bankrupting fines against the City. To the contrary, it was entirely conceivable that the Council would engage the district court in a game of "chicken," with each side seeking to blame the other for the deterio-

---

19/ The ordinance was adopted by a final vote of 5-2, with petitioners Chema and Spallone continuing to dissent. Under the terms of the district court order, their negative votes were no longer deemed contumacious once the ordinance was enacted. (J.A. 398-99).

ration in municipal services.[20] Nothing in logic or law compels the court to engage in such games in order to achieve compliance with a valid order to remedy the intentional violation of constitutional rights.

Amici recognize, as did the district court, that an order requiring individual legislators to vote in favor of a specific legislative proposal has its own drawbacks. See Point IA, infra. But we also recognize the pervasiveness of the underlying discrimination in this case and the importance of enforcing the court's constitutional decrees. Given the primacy of that goal, and the lack of any obviously preferable

---

[20] As fines increased, the possibility of municipal bankruptcy was entirely real and, with it, the prospect of a state takeover. That outcome could not be described as less intrusive by anyone's definition.

alternative, amici do not believe that the district court's order was an abuse of discretion on the facts of this case.

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
(Counsel of Record)
Christopher A. Hansen
John A. Powell
Helen Hershkoff
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Arthur N. Eisenberg
New York Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 382-0557

Dated: June 8, 1989